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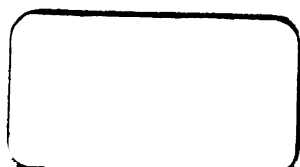
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**REPORTS**

**OF**

**CASES HEARD AND DETERMINED**

**BY THE**

**SUPREME COURT**

**OF**

**SOUTH CAROLINA.**

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**VOLUME XXVII.**

**CONTAINING CASES OF APRIL AND NOVEMBER TERMS, 1887.**

---

**BY ROBERT W. SHAND,**  
**STATE REPORTER.**

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**COLUMBIA, S. C.**  
**JAMES WOODROW & Co., PUBLISHERS.**  
**1888.**

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# JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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## JUSTICES OF THE SUPREME COURT.

### CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

### ASSOCIATE JUSTICES.

HON. HENRY McIVER,

HON. SAMUEL MCGOWAN.

### CIRCUIT JUDGES.

FIRST CIRCUIT, HON. BENJAMIN C. PRESSLEY.

SECOND " " ALFRED P. ALDRICH.

THIRD " " THOMAS B. FRASER.

FOURTH " " JOSHUA H. HUDSON.

FIFTH " " JOSEPH B. KERSHAW.

SIXTH " " ISAAC D. WITHERSPOON.

SEVENTH " " WILLIAM H. WALLACE.

EIGHTH " " JOSEPH J. NORTON.

### ATTORNEY-GENERAL.

HON. JOSEPH H. EARLE.

### SOLICITORS.

1st Circuit—W. ST. J. JERVEY. 5th Circuit—P. H. NELSON.

2d Circuit—W. P. MURPHY. 6th Circuit—J. E. McDONALD.

3d Circuit—T. M. GILLAND. 7th Circuit—D. R. DUNCAN.

4th Circuit—H. H. NEWTON. 8th Circuit—J. L. ORR.

### CLERK OF THE SUPREME COURT.

A. M. BOOZER.



## LIST OF ATTORNEYS

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CHAFEE, W. G.....	Aiken.
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STILL, WM. W.....	Beaufort.
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THOMAS, WM. H... ..	Charleston.
WASHINGTON, J. I.....	Beaufort.
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**REPORTS**  
**OF**  
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**IN THE**  
**SUPREME COURT OF SOUTH CAROLINA.**

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Justices of the Supreme Court during the Period comprised in  
this Volume.

**HON. WILLIAM D. SIMPSON, CHIEF JUSTICE.**

**HON. HENRY McIVER, ASSOCIATE JUSTICE.**

**HON. SAMUEL MCGOWAN, “ “**

---

**NESBITT v. CAVENDER.**

1. A point not raised by the pleadings nor determined by the Circuit Judge, although reported upon by the master, is not properly before this court for consideration.
2. Whether a deed to land, absolute on its face, taken by A from B at the request of C, was intended to operate as a mortgage from C to A, may be shown by parol evidence.
3. But where the testimony failed to establish any such agreement between A and C, parol evidence is inadmissible to show that A was to buy with the privilege on the part of C to take the land at some future time on payment of the purchase money, nothing being agreed upon as to the form of the security. Such evidence is obnoxious to the statute of frauds.
4. Case remanded with leave to plaintiff to amend his complaint, so as to raise the question of a constructive trust.



Before PRESSLEY, J., Richland, November, 1886.

The opinion states the case.

*Messrs. Lyles & Haynsworth*, for appellants.

A deed, absolute on its face, cannot be shown to be a mortgage in favor of one who, at the time of the conveyance, had no interest, legal or equitable, in the property. *Jones Mort.*, §§ 331, 323; 96 *Ill.*, 456; 45 *N. Y.*, 589; 97 *U. S.*, 624; 1 *Story Eq.*, 152; 1 *Jones Mort.*, §§ 268, 269, 335, 327. The authorities relied on by respondent (*Jones Mort.*, §§ 241, 268, 331; 21 *S. C.*, 392) are not in conflict with the above. 12 *Rich. Eq.*, 343; 15 *S. C.*, 356. No trust can be raised in favor of the plaintiff. 7 *Rich. Eq.*, 378, and other authorities. The testimony shows that there was no mortgage—no fraud.

*Messrs. A. C. Moore and Pope & Shand*, contra.

June 23, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The facts of this case about which there is no dispute are as follows: Previous to February, 1879, the plaintiff, respondent, owned certain real estate, situate in the city of Columbia, which he had mortgaged to the Columbia Building and Loan Association. On February 3, 1879, this land was sold under a decretal order of foreclosure of said mortgage, the president of the association, George L. Dial, being the purchaser. After this sale Dial agreed to sell and reconvey the premises to the plaintiff for \$300 cash. The plaintiff being unable to raise this sum himself, submitted the matter to the defendant, Thomas S. Cavender, who, having money of his son, the defendant, Charles Cavender, under his control, consented to make the purchase, and did purchase, taking titles to his said son. Shortly after this purchase the said T. S. Cavender executed a lease of the premises to the plaintiff, "to hold for the term of his natural life and that of his wife, Savannah, and the survivor of them," it being stipulated in said lease that the lessee should pay the sum of \$36 per annum as rent, in monthly instalments of \$3 each, &c., upon default of which for thirty days the said Charles Cavender should have the right to re-enter and repossess the

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premises, &c., &c. Some time after this, to wit, in 1884, many payments having been made by the plaintiff to the said Thomas Cavender, which were entered in a certain book in possession of the plaintiff, subsequently mislaid or lost, as alleged, the plaintiff and the said Cavender failing to agree in reference to some matter connected with the land, the said Cavender instituted proceedings under section 1819, General Statutes, to eject the plaintiff. In the meantime Charles Cavender had conveyed the land to his father, Thomas S., who had mortgaged the premises to the defendant, Rose L. Sprague.

Under the above state of admitted facts the action below was commenced, with the following additional alleged facts, all of which are denied by the defendants, to wit: 1st. That the deed from Dial to Cavender was executed under these circumstances, to wit: the plaintiff being unable to raise the \$300, at which sum Dial had agreed to sell to him, he applied to Cavender to raise this amount for him, which Cavender consented to do, agreeing to advance said amount out of funds which he said he had in his possession belonging to his son, to secure which he was to take the titles to his said son, with the distinct understanding and agreement between himself, the said Cavender, and Dial, that he was to hold the same as a mortgage on the premises to secure the payment by the plaintiff of the said \$300 so advanced for him, which sum being repaid, the premises should be conveyed to the plaintiff. 2d. That the lease above referred to, with the stipulations therein, executed by the plaintiff and defendant, T. S. Cavender, was the result of a wilful and deliberate fraud practised upon the plaintiff by the said Cavender, the said plaintiff being unable to read, and the paper being misrepresented to him. 3d. That plaintiff had made several payments to the said Cavender, amounting to \$150, on account of the principal and interest of the purchase money, and not for rent, which payments had been entered in the book which had been lost, and that since then he had made additional payments, amounting to at least \$124.60, on account of the debt and interest, and not rent, but which had been fraudulently entered by the said Cavender as for rent. As stated above, the defendants denied these allegations, which made the issue in the case.

It was admitted that no one of the defendants had any higher equity than the others, so that no difference was made in the consideration of the cause, because of the subsequent conveyance and mortgage referred to above.

The case was referred to master Seibels, who made an elaborate report, finding as matters of fact upon the disputed allegations in the complaint above: "1st. That the deed from Dial to Cavender was without condition, promise, agreement, or understanding in favor of the plaintiff other than is submitted in the lease. 2d. That on same day (that the deed was executed), in pursuance of a previous verbal agreement, the plaintiff and the said defendant, as the agent of his son, executed in duplicate a lease of said premises upon the terms therein stated, the plaintiff receiving a copy marked 'exhibit L,' and the defendant retaining the copy marked 'exhibit K.' 3d. That the plaintiff paid to the defendant various sums of money from time to time as 'rent' under said lease and took receipts therefor as 'rent.'" Upon these facts the master considered that there was neither a constructive trust nor a mortgage in favor of the plaintiff growing out of the transaction between him and Cavender. And as matter of law he concluded that the defendant, T. S. Cavender, was seized in fee of the premises, subject to the terms of the lease to the plaintiff, and that the complaint should be dismissed.

This report, upon exceptions by the plaintiff, respondent here, was heard by his honor, Judge Pressley, who, finding as a fact, "that the deed from the association to Cavender was intended as a mortgage, and that the lease to the plaintiff was a device to foreclose the same easily on non-payment of the monthly interest thereon, called rent, overruled the defendant's objection, that the case was within the statute of frauds." And he "ordered and adjudged that said deed should stand as a mortgage to secure the defendant any balance which may be owing to him on principal and interest of said loan and any repairs, taxes, or other expenditures he may have incurred, which, according to the terms of the contract, plaintiff should have paid. And that the case be referred back to the master to take the testimony and report the amount due to defendant according to this decree."

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From this decree the defendants have appealed upon the following exceptions :

I. "Because his honor did not hold that the amended complaint in said action failed to allege any facts constituting fraud on the part of the defendants as sufficient to raise a constructive trust in favor of the plaintiff.

II. "Because his honor did not hold that said complaint having alleged only an agreement to convey, and the evidence having tended only to establish such agreement by parol, there was no cause of action in favor of the plaintiff established by his own evidence.

III. "Because his honor did not hold that parol evidence was inadmissible to establish the agreement alleged in said complaint.

IV. "Because his honor held that the testimony of parties to a cause is universally to be viewed with suspicion, and that under such rule the testimony of the plaintiff fully offset that of the defendant, Thomas S. Cavender, regardless of the relative character of the parties and of their respective statements.

V. "Because his honor considered the testimony of the defendant, Cavender, as inconsistent in the particulars specified in his decree.

VI. "Because his honor considered that the defendant Cavender's not having an additional witness to his transactions with the plaintiff, and his objecting to the introduction of hearsay evidence as to the statements of one George L. Dial, deceased, not a part of the *res gestæ*, were circumstances of suspicion against him.

VII. "Because his honor considered that said defendant was contradicted in the particulars named by the witnesses Percival, Parker, Taylor, Albert Davis, and Sancho Davis.

VIII. "Because his honor misconceived the testimony of the witness Smith, and did not discard the testimony of the witness Gibson, for the reasons stated by the master.

X. "Because his honor did not sustain the findings of fact by the master and overruled his report.

XI. "Because his honor found, as matter of fact, that the deed from Dial, president, to Cavender, and the lease from Cavender to Nesbitt, were intended simply as a mortgage from Nesbitt to Cavender.

XII. "Because his honor held that it made no difference in considering the transactions, that Cavender derived his title from a third party, and not from Nesbitt.

XIII. "Because his honor adjudged that said deed stand only as a mortgage.

XIV. "Because his honor did not adjudge that even if said deed was intended only as a mortgage, that the plaintiff could not maintain his action without having first tendered the amount due thereon to the defendant, Cavender." This last exception was abandoned.

The question whether there was such fraud on the part of T. S. Cavender in obtaining the conveyance from Dial, the president of the building and loan association, as to raise a constructive trust in favor of the plaintiff, was not one of the issues made in the pleadings. There was no allegation in the complaint of fraud in reference to obtaining that conveyance, nor did the plaintiff claim in his complaint that this transaction raised a constructive trust in his behalf. On the contrary, the plaintiff based his cause of action upon the claim that said conveyance was in substance and in intent a mortgage, and the purpose of the action was to have it so declared. It is true, the master entertained the question of a constructive trust, and the plaintiff excepted to his report upon the ground, among others, that he erred in not finding, as a matter of fact and law, that a constructive trust *ex maleficio* arose against the defendant and in favor of the plaintiff. But the Circuit Judge did not pass upon this question, and not sustaining the master upon the real question involved and relied upon in the complaint, to wit, that the deed from Dial was intended as a mortgage, he overruled his report upon that ground, which rendered it unnecessary to consider any other questions raised in said report. The first exception above is therefore irrelevant, and need not be considered.

2d. The complaint alleged something more than simply an agreement to convey; it alleged an agreement that the deed in question was to be regarded between the parties as a mortgage, upon the satisfaction of which, by the plaintiff, the land was to be conveyed to him. Such being the fact, his honor could not have held as demanded in exception 2d.

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Exception 3 will be considered with exceptions 11, 12, and 13, as these exceptions, with exception 3, all relate to the same matter, and are involved in the same general question, whether his honor erred in construing the Dial deed as a mortgage. Exceptions from 4 to 10, inclusive, complain mostly of the reasons given by his honor, why he put more confidence in some of the witnesses than in others, and especially why he was disposed to look with suspicion upon the testimony of T. S. Cavender. It is hardly necessary to take these up in detail, as no legal error is alleged, and especially as the whole matter is involved in exception 10, in which it is complained "that his honor did not sustain the findings of fact of the master, and overruled his report."

The main question of fact in the case was whether the Dial deed was intended and understood by the parties as a mortgage. Upon this question the master and Circuit Judge differed. Upon this question it is hardly necessary to refer to authority for the position that parol testimony was competent. The appellants' counsel in their argument frankly admit "that a deed absolute on its face may be shown by parol evidence to have been intended as a mortgage by the grantor to the grantee." This, then, being the question before the court, and not simply whether Cavender had agreed to sell and convey to the plaintiff at some time in the future, dependent upon subsequent events, the admission of parol testimony directed to this question was not error, as complained of in exception 3.

Exceptions 11, 12, and 13 raise the question, was his honor correct in holding that these parties understood and intended the Dial deed to be a mortgage, the lease being a mere device to foreclose the same easily, and that it should be so adjudged and decreed? These are the important questions in the case. The first is a question of fact, and the second a question of law. We have carefully examined the testimony with reference to the question of fact, and while there is abundant evidence that Cavender bought the land at the instance of Nesbitt, and with the view, as understood by Nesbitt, to enable him to hold the property ultimately, in the event that Cavender should be repaid the purchase money, yet we do not find the proof of a distinct agreement between these parties, that the money advanced by Caven-



der was to be regarded as a loan to Nesbitt, which was to be secured by the Dial deed, operating as a mortgage. After the foreclosure of the building association mortgage, Nesbitt learned that Mr. Dial, the president, and purchaser at said sale, was willing to let him have the land back at \$300. Not being able to raise this sum he appealed to Cavender to help him, his object being to get the land into hands where he might redeem it by refunding the amount advanced. Cavender no doubt understood this to be the object of Nesbitt, and it is manifest that he consented to buy with full knowledge that Nesbitt understood that in some way said purchase was for his benefit, in the event that he returned the purchase money.

But there was no definite understanding or agreement as to the means by which the return of said purchase money should be secured. It could have been secured in two ways, 1st, by a loan from Cavender to Nesbitt of the \$300, then a purchase by Nesbitt from Dial, with a mortgage from Nesbitt to Cavender; or, 2d, by a deed from Dial to Cavender upon the payment by Cavender of the purchase money, the land to be held in this latter case, until said purchase money was repaid by Nesbitt. If the first scheme had been adopted actually and in terms, or if it was clear from the testimony, parol or otherwise, that such, by agreement, was to be the effect of the transaction, although the papers executed were not in form of that character, the plaintiff's claim would be much stronger than it is; but we have not been able to find that there was an agreement of this kind between the parties. In our opinion the evidence goes no further than that Cavender was to buy, with the privilege on the part of Nesbitt to take the land at some future time on payment of the purchase money, nothing being said as to the mode in which Cavender was to secure himself. Under these circumstances Cavender took a deed directly to his son with the agreement as to the privilege of Nesbitt to subsequently get the land, resting in parol, and therefore obnoxious to the statute of frauds.

Not being able to concur in the finding of fact of the Circuit Judge, upon which his judgment decreeing the Dial deed to stand as a mortgage, was based, we deem it unnecessary to discuss the question of law above.

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It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial. And inasmuch as the question of *constructive trust* was not adjudicated by the Circuit Judge, that question is left open, with the privilege on the part of the plaintiff to amend his complaint, should he be so advised, so as to raise that question.

---

GREEN v. COUNTY COMMISSIONERS.

1. On appeal from the County Commissioners to the Circuit Court, the only questions before that court are the errors of law and fact alleged in the grounds of appeal.
2. The law does not require the Board of County Commissioners to demand further proof of a claim presented against the county, where the proof submitted does not satisfy them of the correctness of the claim. The proviso to section 623, General Statutes, is permissive only.
3. A claim presented by a practising physician against the county for fees for examining lunatics was properly rejected by the Board of County Commissioners, the claim not showing on its face that the lunatics were paupers, or that he had been called upon by a proper officer to make such examinations.
4. Whether the Circuit Court can remand a case to the County Commissioners for a new trial, not determined.

Before PRESSLEY, J., Richland, November, 1886.

Dr. Frank Green presented a claim to the county commissioners of Richland for his fees for the examination of certain persons for lunacy. The board disallowed the claim, and the claimant appealed to the Circuit Court. At the hearing on Circuit the commissioners orally took the ground that sufficient evidence of the propriety of the account had not been furnished them; and it was urged in argument by claimant's counsel that the commissioners did not require the further proof required by law. Other matters are fully stated in the opinion.

*Mr. A. C. Moore*, for appellant.

*Mr. J. D. Pope* read argument of *Mr. F. W. Fickling*, deceased, contra.

June 23, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. On August 2, 1886, the plaintiff, through his counsel, presented to the board of county commissioners for Richland County, then in session, an account, a copy of which will be found below, requesting that the board would pass on the account at once, and notify him in writing of their decision. The account is as follows:

“County of Richland, To Dr. Frank Green, Dr.

1885.

June 9.	Exam. of Mrs. Levy for lunacy,	\$5 00
Nov. 9.	“ Tena Waters, “	5 00
Nov. 30.	“ Eliza Mott, “	5 00

1886.

Feb. 5.	Exam. of Rose Potts for lunacy,	5 00
Feb. 13.	“ Catherine Hook, “	5 00
Mch 14.	“ Isaac Good, “	5 00
Apl 16.	“ George Ferguson, “	5 00
June 12.	“ Mary DeLorea, “	5 00
July 14.	“ Australia McKenzie, lunacy,	5 00
		—————\$45 00”

With an affidavit of the plaintiff appended “that the foregoing account is just and true; that no part of same has been paid by discount or otherwise. The said services were actually performed according to the law regulating such examinations.” The board referred to their minutes, from which it appeared that one of the conditions upon which the county physician accepted the appointment was that he should make no charge for acting as one of the examining physicians in all cases of lunacy. But as the plaintiff does not seem to have been appointed county physician, it is difficult to understand what this had to do with the matter.

No further evidence being offered either for or against the account, the claim was disallowed, and notice at once given to the counsel for plaintiff as he had requested. Thereupon the plaintiff appealed to the Circuit Court on the following grounds: “1.

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Because the said account truly represents services actually rendered by the said Frank Green, as therein stated. 2. Because the prices therein charged are those allowed by law for such services. 3. Because the said account is just and true, and no part thereof has been paid by discount or otherwise, and is so proved by the oath of the said Frank Green, without contradiction by evidence or otherwise. 4. Because the said Frank Green is a licensed practising physician of the said State, and as such entitled and authorized by law to perform such services and make such charges therefor. 5. Because it is not alleged or pretended by the said county commissioners that the said Frank Green is not a licensed practising physician of the said State, or that he was not authorized to perform such services or make such charges, or that he did not perform such services, or any part thereof, or that said charges, or any of them, are incorrect, or that they, or any or either of them, or any part thereof, have been paid by discount or otherwise. 6. Because the said account has been arbitrarily disallowed by the said county commissioners without any cause assigned or assignable."

Upon being served with these grounds of appeal, the county commissioners made a return to the Court of Common Pleas, setting forth the facts hereinbefore substantially stated. Judge Pressley, before whom the appeal was heard, granted the following order: "On hearing the judgment of the county commissioners in this case and the grounds of appeal therefrom, and the return of the respondents, and it appearing that the respondents did not require such further evidence of the truth and propriety of the charges of the appellant as is required by law, it is ordered that the judgment of the county commissioners of Richland County be set aside, and that the case be remanded to them for rehearing and for the hearing of such further evidence of the truth and propriety of said charges as the nature of the case may require and as may be just."

From this order the county commissioners appeal to this court upon the following grounds: "1. Because his honor erred in finding that the respondents, the county commissioners, did not require such further evidence of the truth and propriety of the charges of appellant as is required by law. 2. Because his hon-

or erred in not finding that the appellant, Frank Green, had failed to make out his case before the board of county commissioners. 3. Because his honor erred in not dismissing the appeal. 4. Because his honor erred in ordering that the judgment of the county commissioners for Richland County in this case be set aside, and the case remanded to them for rehearing, and for the hearing of such further evidence of the truth and propriety of said charges as the nature of the case may require and as may be just. 5. Because his honor erred in remanding the case to the county commissioners, he having no power or authority to do anything more than affirm or reverse their judgment. 6. Because there was no error in the judgment of the board of county commissioners, and his honor erred in not so holding and in not affirming the said judgment."

It seems to us that the only question for the Circuit Judge to determine upon the hearing of the appeal from the judgment of the county commissioners was, whether any errors of law or fact had been pointed out by the grounds of appeal from such judgment. Now, when we come to consider those grounds, which for this reason have hereinbefore been set out, *in haec verba*, it is difficult to discover any specific allegation of error. They consist mainly of assertions of facts which tend to show the justice of the claim, but do not designate any particular or specific error, either of law or fact, in rejecting the claim. They do not even impute error to the county commissioners in not requiring further evidence of the truth or propriety of the account. The Circuit Judge, however, bases his action solely upon this ground, setting aside the judgment of the county commissioners, and ordering a rehearing, because it appeared that the county commissioners "did not require such further evidence of the truth and propriety of the charges of the appellant as is required by law," and we are to inquire whether he erred in so doing.

In the first place, we are unable to discover from the record how it was made to appear that the county commissioners either refused or neglected to require such further evidence. All that was properly before the Circuit Judge was the return and the grounds of appeal, and it certainly does not appear affirmatively in the return that the county commissioners declined to require

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further evidence of the truth or propriety of the charges. All that there appears is that the account was presented, in the form hereinbefore stated, with the affidavit of the plaintiff appended; that the board referred to the minutes of former meetings, which, so far as we can see, had no bearing on the question, and that "no further evidence was offered for or against the said account," but whether the board required or declined to require further evidence is not stated.

But, in the second place, assuming that it did appear that the board did not require such further evidence, we are unable to see that they committed any error of law in not doing so. The statute does not require that the board should demand such further evidence. It is only permissive. The language of the proviso to section 623 of the General Statutes, relied on by the plaintiff, is as follows: "Nothing in this section shall be construed to prevent any board from disallowing any account, in whole or in part, when so rendered and verified, if it appears that the charges are incorrect, or that the services or disbursements have not in fact been made or rendered, nor from requiring any other or further evidence of the truth or propriety thereof. No allowance or payment beyond legal claims shall ever be allowed. And the board of county commissioners in any county may refuse to audit or allow any claim or demand whatsoever, unless made out and verified in the manner herein specified." So that it is plain that the provision for requiring further evidence is merely permissive and not mandatory, and if the board neglect to require such further evidence, no error of law can be imputed to them on that account.

That same section, however, does require that no account shall be audited and ordered to be paid unless such account shall be made out in items, and does authorize the board to refuse "to audit or allow any claim or demand whatsoever, unless made out and verified in the manner herein specified." It seems to us quite clear that the account in controversy here was not made out in accordance with this requirement, and this would have been a sufficient reason for its rejection. It does not appear that the persons alleged to have been examined for lunacy were paupers, and as such chargeable to Richland County; nor does it appear that such examination was made by the plaintiff at the



instance of any of the officers mentioned in section 1588 of the General Statutes, as amended by the act of 1882 (18 Stat., 129), as authorized to call in the services of a physician for that purpose. All these facts were essential to constitute any valid claim against the county, and their omission, either by way of allegation or proof, might well have warranted the county commissioners in disallowing the claim. Indeed, for all that appears, inasmuch as no reasons are given for the judgment of the county commissioners, this might have been the ground upon which the claim was disallowed; and, in our opinion, it would have been a very good ground. If the claim had been allowed and a warrant for its payment issued, it would have become a part of the records of the office of the county commissioners, and ought to show on its face such facts as would make it a proper charge upon the county; whereas in its present form it shows nothing of the kind. The affidavit appended that "said services were actually performed according to the law regulating such examinations," is a mere statement of a legal opinion, and cannot be regarded as a statement of such facts as would show the liability of the county.

While we do not mean to intimate even, that there was anything wrong about this account, yet the fact that it was alleged to be necessary to examine such a considerable number of persons as pauper-lunatics in a single county, in so short a period of time, but little over one year, was a circumstance well calculated to arrest the attention of the county commissioners, and call for a careful examination of the claim, and if upon such examination the claim did not appear properly made out or properly substantiated, it was not only their right, but their duty, to reject it; and we have not been able to discover that they have committed any error in so doing.

The appellants, in one of their grounds of appeal, challenge the right of the Circuit Judge to order a new trial, which was practically done in this case, upon an appeal from the judgment of the county commissioners, insisting that, under the statute, he can only affirm or reverse such judgment. Such does seem to be the language of section 368 of the Code, which goes on to provide that, in an appeal from the judgment of a trial justice, a new trial may be ordered, *where the judgment was rendered by*

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*default*, provided the appellant excuses his default and shows that manifest injustice has been done him. From this it is argued that in no other case can a new trial be ordered on an appeal from an inferior court to the Circuit Court, but that such court, in all other cases, can only affirm or reverse the judgment of the court below. Whether the right to reverse a judgment does not necessarily carry with it the power to order a new trial in a case proper for that purpose, and whether the general right of appeal from the judgment of the county commissioners, secured by the constitution, does not involve the right to grant a new trial, in a case where such a proceeding would be appropriate, are questions which do not now necessarily arise, and need not therefore be discussed; inasmuch as, conceding the right to grant a new trial, we have reached the conclusion that there was no sufficient ground for it in this case.

The judgment of this court is, that the judgment of the Circuit Court be reversed.

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SCOTT v. ALEXANDER.

1. The right to costs depends wholly upon statute, and cannot be extended by the courts. For every item of costs or disbursements claimed, statutory authority must be shown.
2. There is no statute allowing the expense of printing papers for the use of the Circuit Court to be taxed as a disbursement in the cause. Printing of papers is only allowed "when required by a rule of the court," and the rules of court require printing only in the Supreme Court.
3. An order of a Circuit Judge in a cause does not operate as a rule of court. A "rule of the court," as here used (*Code*, § 326), means a pre-existing rule of general operation, and not a mere order *pro hac vice*.
4. On appeal from the final judgment, an interlocutory order in the cause, requiring the printing of a referee's report for the use of the Circuit Court, may be reviewed.
5. There is no authority for taxing the fees of a stenographer, specially appointed for the case by order of the Circuit Judge, as a disbursement in the cause.
6. Items of costs for services rendered under new issues raised by amended pleadings, are not chargeable in this case to parties having no concern with the new issues so raised. *Scott v. Alexander*, 23 S. C., 120.

7. The report of a referee not being furnished to this court, error cannot be declared in the Circuit decree in determining the scope of such report.
8. The decision of this case on a former appeal (23 S. C., 120), stated.
9. The clerk of the Circuit Court is entitled to a docket fee for every term that the case is on the calendar.
10. General exceptions need not be considered.

Before FRASER, J., Richland, April, 1886.

The opinion states the case. The Circuit decree was as follows :

The liability of certain defendants in the above stated case having been passed upon by the Circuit Court, an appeal was taken. The Supreme Court concurring with the Circuit Judge as to their liability for costs, announced the principle by which the taxation of costs as against them should be governed as follows: "They are only chargeable with such costs and disbursements as plaintiff may have sustained in determining the issues originally raised, viz., whether these appellants, with their associates in the board of aldermen, *had increased, or were continuing to increase, the city debt* beyond the prescribed limit at the time of the commencement of the action ; whether such costs were incurred before or after the granting of the order of injunction on September 7, 1875, taking care that in charging them with costs and disbursements incurred after that date, that they should be only such costs and disbursements as would be incurred in hearing and determining such issues, and not costs and disbursements in hearing and determining any new issues raised by the complaint as amended."

An inspection of the various reports made by referee Lowe, LeConte, and master Barnwell, has brought me to the conclusion that the work done by them would have been necessary for the hearing and determination of the original issues, even if the new issues had never been raised by the amendments. It is nothing to the purpose to say that circumstances had occurred since the commencement of the action, which made it unnecessary, and even improper, to give to plaintiff the relief demanded in the original complaint, and that they occurred before the costs were incurred. If for no other purpose, it was proper, in order to

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determine their liability for costs, that the court should, in the regular way, ascertain whether at the commencement of the action they had increased, or were continuing to increase, the city debt. It is their misfortune that these defendants made it necessary to incur so much costs by not admitting at the outset what these reports show to be true, that they were increasing the city debt. A good deal of the work done by the referees and the master is certainly applicable to the new as well as to the original issues raised by the amendments to the complaint, but I think that this cannot relieve the defendants from their liability for the costs. If there is any part of the work done on these reports applicable only to the new issues, I am unable to separate it from the other in any satisfactory way without much more information as to surrounding circumstances than has been furnished to me in this case.

I do not understand the exceptions to go to the amount of these charges, but only to the liability to pay them under the order of the Supreme Court. While this case is on the docket for any purpose involving these defendants, they should be liable for the docket fees, and I see no reason why clerk D. B. Miller should not be paid by them the costs taxed in his favor.

In the absence of some *rule of court* on the subject, I do not know of any authority for allowing bills for printing papers in a case to be taxed as disbursements. See *Code*, § 326. There is no rule of court which authorizes any printing of papers for the Circuit Court to be taxed as costs or disbursements, and I feel constrained to reject all these bills.

If the notices in the bill for \$33.45 were to call in creditors of the city, they were relevant to the new issues, and not to the original ones. If it was a mode of calling on witnesses to testify in the case, it is not the mode known to the law and practice of the courts.

In the absence of some statute, neither the master nor referee has a right to employ a clerk or stenographer to aid him in his duties, and I do not know of any authority in the court to appoint one.

For these reasons I must sustain the exceptions as to the printing reports, \$865.00; printing briefs, \$33.75; printing notices,

\$33.45; and stenographer, \$279.00; and the rest of the taxation is approved and confirmed, and it is so ordered and adjudged.

*Messrs. Clark & Muller*, for plaintiff.

*Messrs. Bachman & Youmans*, for defendants.

June 23, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This is the second appeal in this case upon the same matter of costs, and for a full statement of the facts, which it is unnecessary to repeat here, reference must be had to the case as reported in 23 S. C., 120.

In pursuance of the decree then rendered, Judge Kershaw, in a carefully drawn order, directed the clerk to adjust the costs and disbursements in accordance with the directions of this court, and the case came before Judge Fraser upon exceptions to the adjustment made by the clerk. He held that the reports of the referees and master would have been necessary for the determination of the original issues, even if no new issues had been raised by the amendments to the complaint, and that though a good deal of the work done by these officers was applicable to the new as well as the original issues, this could not relieve the defendants from liability, as he had not been furnished with sufficient information to enable him to separate that part of such work as was applicable alone to the new issues, from that necessary for the determination of the original issue. He therefore held the defendants liable for the costs of the referees and master. He also held that there was no legal authority for allowing the expense of printing papers for a hearing in the Circuit Court as disbursements, and he therefore rejected these items. For the same reason he rejected the item charged for the services of a stenographer and the item for printing notices to call in creditors, and approved and confirmed the taxation as made by the clerk in all other respects.

From this order both parties appeal. The plaintiff, upon the ground of error in disallowing the charges for printing the reports and briefs, printing the notice to creditors, and for the services of the stenographer. The defendants appeal: 1. Upon the

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ground of error in holding that the reports of the referees and the master were necessary for the determination of the original issue. 2. In holding that the defendants were liable for any of the costs incurred on the new issues. 3. In holding that the defendants were liable for any costs incurred after the order of injunction. 4. In allowing docket fees. 5. In approving and confirming "the rest of the taxation."

First, as to the plaintiff's grounds of appeal. The right to costs depends wholly upon statute, and in the absence of some statutory provision we do not see how they can be claimed. Even the court has no power by its order to add anything to the allowances prescribed by statute, and hence when a claim to any item, either of costs or disbursements, is asserted, the claimant must be able to point to the statute allowing such item. It is quite clear that there is no statute allowing the expense of printing reports or other papers for a hearing in the Circuit Court as a disbursement in the cause. The nearest approach to such a provision is that contained in section 326 of the Code, where "the expense of printing the papers for any hearing, when required by a rule of the court," is placed among the necessary disbursements; but it will be observed that the expense of printing is only allowed "*when required by a rule of the court,*" and we are not aware of any rule, in the proper sense of that term, requiring the printing of any paper for a hearing in the Circuit Court. There is such a rule in regard to certain papers in the Supreme Court, and it is manifest that the statutory provision above referred to applies only to the printing of papers for a hearing in the Supreme Court, because there alone is there any rule *requiring* the printing of any paper.

The position taken by the counsel for plaintiff, that the order of Judge Cooke, directing the printing of the report of referee Lowe, operates as a rule of court in this case, and brings the claim within the provision of the code above referred to, cannot, in our judgment, be sustained. To say nothing of the fact that this order only requires the printing of Lowe's report, and would not therefore embrace the reports of LeConte or the master, which of itself would deprive this order of one of the essential characteristics of a *rule*, which is supposed and intended to oper-

ate *generally*, and not to be confined to a particular instance, we do not think the language of the section can be properly construed so as to include any order that may be made in the progress of the cause. It will be observed that the language of the section is *not* when required by a rule or order of the court, as would have been natural and appropriate if the intention had been that the section should be construed as contended for, but the language is, "when required by a rule of the court," by which we understand a pre-existing rule of general operation, and not a mere order *pro hac vice*.

Nor do we think that the position taken that this is an interlocutory order unappealed from, and therefore binding upon the parties, can be sustained. In the first place, the order seems to have been *ex parte*, and whether it was ever brought to the notice of the parties to be affected by it, or if so when, does not appear. But waiving this, we do not see why the present appeal cannot be regarded as an appeal from that order, for this may be regarded as an appeal from a final judgment, in which all interlocutory orders not previously appealed from may be reviewed; for to give the order the effect contended for would make it an "intermediate order or decree necessarily affecting the judgment," which may be reviewed on appeal from the final judgment. Code, section 11, subdivision 1. Here the attempt is made to enter in the final judgment a charge as a disbursement, upon the authority of an intermediate order in the cause, the legality of which is questioned and successfully challenged; for we think it clear that no court or judge has any authority to add any item to the costs or disbursements in a case for which there is no statutory authority.

The same remarks will apply to the charges for printing briefs<sup>1</sup> (which seems to be abandoned), and for compensation to the stenographer. There is no statutory authority for either of these charges, and they were properly disallowed.

As to the item for "printing notices," we agree with the Circuit Judge that they were relevant alone to the new issues, and therefore not properly chargeable against these defendants under the principles laid down in the former opinion.

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<sup>1</sup> I. e., on Circuit.—REPORTER.

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Next as to the defendants' exceptions. In the absence of the reports of the referees and the master, which are not now, and never have been, before us in this case, we cannot undertake to say that the Circuit Judge erred in holding that they were necessary to the determination of the original issue raised by these defendants. On the contrary, we are bound to assume that he was correct in so holding, inasmuch as no error is pointed out.

The second exception is taken under a misconception of the Circuit decree. We do not understand that Judge Fraser held that these defendants were liable for any of the costs incurred in determining the new issues raised by the amendments to the complaint. What he said was, that "a good deal of the work done by the referees and the master is certainly applicable to the new as well as to the original issues," and then added: "If there is any part of the work done on these reports applicable only to the new issues, I am unable to separate it from the other in any satisfactory way without much more information as to surrounding circumstances than has been furnished to me in this case;" and we do not see what else he could have said.

The third exception has already been disposed of by the former opinion in this case, which in terms declared that these appellants were liable for the costs incurred in determining the issue originally raised, "whether such costs and disbursements were incurred *before or after* the granting the order of injunction of the 7th of September, 1875." It is a mistake to suppose that the original object of the action was affected by the order of injunction, and hence that the case should be regarded as having then terminated, so far as these defendants, appellants, are concerned. The complaint alleged that these defendants had increased, and were continuing to increase, the city debt beyond the amount allowed by law, and this allegation was denied by the answer, though the defendants did say in their answer that the city debt, at the time of the passage of the act fixing a limit to the amount of such debt, far exceeded the amount therein fixed. The issue thus raised, as to whether *these defendants* had increased, and were continuing to increase, the city debt beyond the prescribed limit, was not determined by the order of injunction, which was merely temporary, and in terms declared to be



"until the further order of the court," and, as held in the former opinion, these defendants are justly liable for all costs incurred in the determination of such issue, whether the same were incurred before or after the order of temporary injunction was granted.

We see no ground upon which the 4th exception can be sustained, and none has been suggested in argument. The 5th ground is too general to require any further notice at our hands.

The judgment of this court is, that the order or decree appealed from be affirmed.

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STATE v. MOORMAN.

1. Before any confession of a prisoner is received, it should be shown to the trial judge that the confession was voluntary and free from any inducement addressed to either the hopes or the fears of the prisoner.
2. The charge in this case was not on the facts in violation of the constitutional inhibition.
3. There was no error in failing to instruct the jury that the prisoner was entitled to the benefit of all reasonable doubts, the judge not having been requested so to charge.

Before ALDRICH, J., Union, March, 1887.

This was an indictment against Ike Moorman for arson. The evidence consisted wholly of confessions made by the prisoner on the morning after his arrest. The witnesses for the prosecution proved these confessions after satisfying the presiding judge that they had not been extorted by any threats or promises on the part of these witnesses. The presiding judge was so satisfied from the statements made by the witnesses, without permitting any cross-examination upon this preliminary inquiry. Counsel for defendant said: "I would like to know the whole circumstances under which this was. I would like for your honor to examine this witness.

"The Court: You can ask him that on the cross-examination.

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"Mr. Townsend: But the testimony will then have gone to the jury.

"The Court: It has got a right to go to the jury now. The witness has said that what communication he received he received it freely, voluntarily, without fear, without inducement, without threat. Now, if that is not laying the foundation completely, I don't know.

"Mr. Townsend: All of that is an opinion of this witness. Now, what I want, your honor, is, that the circumstances under which he gave it may be testified to in open court, in order that the court may judge whether it was free, or voluntary, or without fear.

"The Court: You can bring that out on the cross-examination, and if the testimony is incompetent, I will have it struck out.

"Mr. Townsend excepts."

It appeared on the cross-examination of these witnesses that the prisoner and Jim Ferris were arrested about 9 or 10 o'clock at night, and were carried about fourteen miles, reaching Crosby's store about midnight; but on their way a party of unknown men took the two prisoners away and apart from this arresting party. The defendant and Ferris (as to whom the grand jury found no bill) testified that this unknown party separated the two prisoners, and persuaded each that the other had been killed, hung both of them up to a tree, and by threats extorted a confession from Moorman, and a statement from Ferris that Moorman was not with him at the time of the fire. And Moorman testified that the fears aroused the night before had not subsided when he repeated these confessions next morning to the witnesses in the case. After this testimony no request was made to rule out the confessions proved by the State.

The judge's charge was as follows:

Just after the war these fires of barns and gin houses, mills, and other buildings attached to the plantations, were so frequent that the legislature found it necessary to make the penalty severe, and so the burning of one of these houses was made the same as if it was a dwelling house. But since then the law has been moderated, and the jury, if they find the prisoner guilty of burning one of these gins or mills or barns, if they recommend him

to mercy, the court may sentence him to imprisonment not less than ten years. So that this is simply a question of fact for you to decide. I have no instructions to give you. There is no law in the case. The question is simply one of fact, who burned this gin?

Now, you heard something said in the examination of the exceptions taken to the ruling of the court as to confessions. There seems to be a misapprehension on the mind of the learned counsel. All that is necessary is that the confession should be voluntary. If a man is in shackles, or is bound on his arms, or even is in his cell, if he calls for an officer of the court, or a friend, or any other person, and makes a voluntary confession, the courts have held again and again that that is all that is necessary. There must be no inducement held out to him, either of hope or reward, or of fear of punishment, simply that he voluntarily confesses.

Now, in this case you have to deal with confessions entirely. This man has made confessions to one, two, and three persons. Was his confession made to the magistrate, the trial justice, when he was walking along by his side with his arm over his horse's neck—was that a voluntary confession? Was any inducement held out to him then? Was his confession to Mr. Pennington in the store when he was not even bound, was that a voluntary confession? He asked him to come and see him. Is that voluntary, or was there any fear under which he was laboring that induced him to make that confession? Those are matters for your consideration, and yours alone, and really that is all the instruction that I have to give you in this case, for as I said it is a question of fact, and the law makes you sole judges of those questions. The defence is, first, that it was an accidental fire, his confessions say. Those are his confessions. He says he did light a splinter and throw it down there, and escaped, or ran away. That is the burden of his confession. He does not say that he made any attempt to put out the fire, or that he gave any alarm. He simply got scared and ran off.

The defence is that he was not there at all, an *alibi*; that he was not at the gin-house that night—he never went near it—and if that be true, why, of course, he could not have been the incen-

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diary. But those are matters which you are to determine, and upon the decision of which I cannot assist you, for the law does not permit me.

If you find a verdict of "guilty," he will be executed. If you find a verdict of "guilty" and recommend him to mercy, he will be imprisoned. If you find a verdict of "not guilty," he will be discharged. Take the record and consider the case.

The jury found a verdict of guilty, and the defendant was sentenced. He appealed on the following exceptions:

1. Because his honor, the presiding judge, erred in allowing the confessions of Ike Moorman to go to the jury, when it clearly appeared from the testimony that they were made under duress and threats of bodily harm, and were otherwise involuntary.

2. For that his honor erred in basing his opinion and ruling as to the admissibility of said confessions on the statement of the witness, in terms, that the said confessions were made freely and voluntarily, and without inducement or threats; whereas, his honor should have required testimony in regard to all the circumstances under which said confessions were made, upon which to base his opinion and ruling as to the admissibility of said confessions.

3. Because his honor erred in not allowing all the circumstances under which said confessions were made to be proved before making his ruling in regard to the admissibility of said confessions.

4. Because his honor erred in refusing to strike out said confessions after all the circumstances under which they were made had been proved.

5. Because his honor erred in charging the jury, in substance, that a confession was made to the committing trial justice while walking along by his side with his arm over his horse's neck, when it clearly appears that no confession was made under such circumstances, and that such circumstances did not exist; and that this part of his charge was otherwise misleading.

6. Because his honor erred in charging the jury in regard to the confession proved by the witness, B. F. Pennington: 1st. In that his honor charged the jury that the defendant sent for Pennington; and, 2d. In that his honor charged the jury that the de-

fendant made a confession to Pennington while not even bound—as it clearly appears from the testimony that at the time referred to the defendant was tied with a rope, and there is no evidence whatever that the defendant sent for Pennington.

7. Because his honor violated art. 4, sec. 26, of the State Constitution, by intimating his own opinion to the jury in the use of the following words, to wit: \* \* \*

9. Because his honor erred in omitting to charge the jury that if they entertained a reasonable doubt as to the guilt of the defendant, they must resolve that doubt in favor of the defendant.

*Messrs. I. G. McKissick and D. A. Townsend, for appellant.*

*Mr. Duncan, solicitor, contra.*

June 23, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The appellant, Ike Moorman, was indicted for arson. He was convicted at the March term of the court for Union county, 1887, and was sentenced by his honor, Judge Aldrich, to ten years at hard labor in the penitentiary. From this judgment he has appealed to this court, alleging error to the rulings and charge of his honor. His appeal is grounded upon nine exceptions. The main points involved, however, are but two, to wit: 1st. That certain confessions made by the defendant should not have been allowed to go to the jury under the circumstances surrounding him when they were made. 2d. That his honor violated art. 4, sec. 26, of the Constitution in intimating his opinion to the jury on the effect of the facts proved in certain particulars.

The law in reference to the competency of confessions is correctly stated in appellant's argument. They must be free and voluntary. See case of *State v. Kirby*, 1 *Strob.*, 378. They must not be made under the influence of hope or fear, and should always be received with great caution. For, besides (as is said by Mr. Greenleaf) the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, the situation of the prisoner, oppressed with his calamity, should not

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be forgotten, nor the zeal of those seeking to detect the offender. Subject to these cautions, however, it is admitted that a deliberate confession affords the highest evidence of guilt. But before any confession is received it should be shown that it was voluntary—that it was free from any inducement, addressed either to his hope or his fears; and this is a preliminary question for the court, who admits or rejects it, as he may or may not find it to have been drawn from the prisoner by the application of improper motives. In other words, before a confession can go to the jury, the question of its competency must first be determined by the judge, and to that end the usual practice is to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him. 1 *Greenl. Evid.*, § 219. But at last this matter is left very much to the discretion of the judge upon all the circumstances of the case, the rule of law in all cases demanding that he shall see to it that the confession, before it is held competent, shall have been made voluntarily without the appliance of either hope or fear.

It appears that confessions of the prisoner here were testified to by some five witnesses, to all of whom, except the witness Pennington, questions were propounded whether any inducement was held out, or any threat made, or anything said to induce him to believe that it would be better for him to confess, and worse if he did not, all of them answering positively in the negative. The conversation with Pennington was very short, it occurring while he had stopped with the train; and it is apparent that he held out no inducement of any kind to the prisoner. Under these circumstances we cannot see that the discretion of his honor was at fault in admitting the testimony. But even after the confessions were admitted, he left it to the jury in his charge to discard the evidence if they believed that the confessions were extorted from the prisoner. Although he had held them competent, because in his judgment they were voluntary, yet he charged that whether said confessions were voluntary, or were the result of fear, was a matter for their consideration, and theirs alone. This, perhaps, was not in accord-

ance with strict law, yet it was an error, if error it be, of which the prisoner could not complain, as it gave to the jury the right to disregard in favor of the prisoner, as incompetent, testimony which he had already pronounced competent.<sup>1</sup>

We do not see that his honor charged the jury upon the facts in violation of the inhibition of the constitution on that subject. He stated interrogatively what some of the witnesses had said, and he may have been mistaken in saying that Pennington had been sent for by the prisoner, and that he was not tied at that time. Admitting this, yet this was not such an error as would demand a new trial in the face of the other testimony in the case, as he neither expressed or indicated any opinion as to the truth of the confessions, or the testimony of the witnesses on that subject. On the contrary, he distinctly charged that the case was one of fact, and that the law made them the sole judge of such a question, and that the law did not permit him to assist them.

There was no request made that the judge should charge any special proposition of law. Therefore the 9th exception is not before us.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

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<sup>1</sup> This case was peculiar. Nothing passed between the defendant and the witnesses for the prosecution, to exclude the confessions. But if the defendant and his witness testified truly, then a most outrageous device was pursued by certain unknown parties to excite the prisoner's fears and to extort a confession of guilt. While, therefore, the judge did not err in admitting proof of these confessions, what was the proper course for him to pursue when the defendant's testimony was given? He must either have ruled out the confessions in evidence, or else instructed the jury that if they believed the confessions were not voluntary, but made under the influence of previous intimidation, to disregard them. He adopted the latter course. If the other course was proper, defendant's counsel should have moved to that effect.—REPORTER.

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## STATE v. SYPHRETT.

1. In prosecutions for libel it is the duty of the trial judge to declare to the jury the law applicable thereto, and if he errs in so doing, such errors may be reviewed on appeal to this court. The constitutional provision that "in all indictments for libel, the jury shall be the judges of the law and the facts," does not prevent the presiding judge from instructing the jury as to the law, nor this court from entertaining an appeal from a conviction.
2. Where an indictment upon its face is sufficient to sustain the charge there made, but insufficient to support the offence as disclosed by the evidence, judgment cannot be arrested, even though the evidence fails to sustain the charge as made.
3. Is it necessary that an indictment for libel upon a private individual, where the libel has been published, should contain an allegation of intent to provoke a breach of the peace? But if not published, except to the person libelled, such an allegation is necessary. }
4. Where the defendant sent a libellous letter, sealed, to the prosecutor, who, not being able to read, got his wife to read it to him, there was no publication of the libel by the defendant—it not being shown that the defendant knew that the prosecutor could not read.

Before KERSHAW, J., Orangeburg, September, 1886.

The opinion fully states the case.

*Messrs. Izlar & Glaze*, for appellant.

*Mr. Jervey*, solicitor, contra.

June 23, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. The appellant having been convicted of libel, appeals to this court upon the several grounds set out in the record, which will hereinafter be more particularly stated. The alleged libel was in the form of a letter from the defendant to the prosecutor, containing a charge of larceny. It was sealed when delivered to the prosecutor, and the only evidence tending to prove a publication was that the prosecutor, not being able to read, asked his wife to read it to him, and several days afterwards that prosecutor, in the presence of others, asked the defendant if he had written such a letter, and he admitted that he had.



There was no allegation or evidence that defendant knew that prosecutor was unable to read, and the indictment contained no allegation that the defendant sent the letter to the prosecutor with the intent to provoke a breach of the peace.

Judge Kershaw, in his charge to the jury, while fully recognizing the right of the jury, under an indictment for libel, to be the judges of the law as well as the facts, said that he did not think that this relieved him from the duty of giving to the jury his views of the law of libel. After defining the offence charged, and explaining to the jury the several questions which they would be called upon to determine as to the question of publication, he charged the jury substantially as follows: That while it was true, as claimed by the counsel for defendant, that to write a libellous letter, seal it up and send it to the party libelled, would not constitute the offence charged, unless the indictment contained an allegation that the letter was sent with the intent to provoke a breach of the peace, yet as there was evidence in this case tending to show that the letter was addressed to a person who could not read, and who could not therefore know the contents of the letter without calling in the aid of some one else, if the jury believed that the letter was given to the wife by the prosecutor to be read, because of the necessity arising from his being unable to read, that would be such a publication as would dispense with the necessity for the allegation in the indictment that the letter was sent with the intent to provoke a breach of the peace.

The defendant's motion in arrest of judgment having been overruled and sentence passed, the defendant appeals upon the following grounds:

I. "Because his honor erred in overruling the motion of the defendant in arrest of judgment, made on the following grounds: (1) Because the proof being that the letter was delivered sealed to the prosecutor, the person libelled, the indictment is defective on its face, there being no averment therein that the defendant intended thereby to provoke and incite the prosecutor to a breach of the peace. (2) Because the proof of publication was insufficient to sustain the averments of the indictment, which alleged a publication generally, and not a publication with intent to provoke and excite the prosecutor to a breach of the peace. (3)

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Because the proof being that the letter was delivered sealed to the prosecutor, and by him taken to his house and there read to him by his wife at his request, he being unable to read, a fact not proved to have been known by the defendant, was not such a publication, no other person being present, as is sufficient to support the indictment herein or to sustain a conviction thereunder. Such publication must be alleged to have been sent with intent to provoke the prosecutor to a breach of the peace.

II. "Because his honor erred in charging the jury as to the law of libel, the jury being the judges of both 'the law and the facts,' under article I., section 8, of the Constitution of this State.

III. "Because his honor erred in holding that, under the evidence in this case, the indictment was good, notwithstanding it did not contain the averment that the defendant intended by sending the libel to the prosecutor to provoke and incite him to a breach of the peace.

IV. "Because his honor erred in charging the jury that, notwithstanding the letter was delivered sealed to the prosecutor, and was only read to him by his wife at his request, no other person being present, he being unable to read, that this was a sufficient publication thereof to sustain the averments of the indictment and a conviction thereunder.

V. "Because his honor erred in holding that, under the evidence in this case, there was a sufficient publication of the libel to sustain the averments in the indictment, there being no evidence to show that the defendant knew, at the time the letter was delivered to the prosecutor, that he could not read.

VI. "Because his honor erred in not leaving it entirely to the jury (the jury being the judges of the law and the facts) to say whether the defendant intended to injure the reputation of the prosecutor with the world at large who knew nothing of the libel, the publication being confined to the prosecutor and his wife."

Before proceeding to a consideration of the several points made by the grounds of appeal it will be necessary, first, to dispose of a preliminary objection raised by the solicitor as to the jurisdiction of this court to hear and decide this appeal. This objection is based upon a provision in section 8, article I., of the Constitution, declaring that "in all indictments for libel, the jury

shall be the judges of the law and the facts." By this provision, the solicitor contends—to use his own language—"the jury was put beyond the direction and control, although entitled to the advice, of the court. It was equivalent to repealing and wiping out all general and uniform law in this State as to libel. There is now a special law for each case, and each jury enacts that law. What writings are libellous; what is sufficient publication; what intent or motive must be shown to constitute the offence, are all as much questions for the jury, and *exclusively* for the jury, as are the facts of the case, and there can therefore be no appeal from their finding."

If such a construction can be properly placed upon this provision of the constitution, then, indeed, it furnishes a sad commentary on the utter insufficiency of human language to express the intentions of those who used it; nay more, of its capacity to be perverted by construction so as to effect precisely the opposite result from that which was intended. The slightest examination of the history of the controversy which led to the adoption of this or similar provisions will show that the sole purpose was to preserve the liberty of the press by protecting those charged with the abuse of such liberty, in the publication of alleged libels, from arbitrary power. Such being the object, it might be quite as dangerous to the liberty of the citizen to subject him to the arbitrary power of the jury as it would have been to leave him to the arbitrary power of the court. Indeed, it would be difficult to conceive of a more odious system of judicature than that by which a man would be tried by a law of which he was not merely ignorant, but of which he could not possibly inform himself, inasmuch as it would be locked up in the breasts of his triers until the verdict was rendered.

We cannot, therefore, assent to the proposition that the effect of the provision of the constitution under consideration "was equivalent to repealing and wiping out all general and uniform law in this State as to libel," and that "there is now a special law for each case, and each jury enacts that law." The only authority cited in support of such a proposition is an unsupported dictum of Willard, J., in *State v. Bailey* (1 S. C. Rep., at page 6), where he says that the object of such a constitutional provision

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is "to commit the rights of parties to the dictates of natural law that resides in the breast of the citizen rather than to the deductions of formal and scientific law as administered by the courts." Such a view cannot command our assent. On the contrary, we agree with that eminent author, Dr. Wharton, who concludes an interesting discussion of the right of a jury to determine the law, with this striking and appropriate language: "Subject to the qualification that all acquittals are final, the law in criminal cases is to be determined by the court. In this way we have our liberties and rights determined, not by an irresponsible, but by a responsible tribunal; not by a tribunal ignorant of the law, but by a tribunal trained to and disciplined by the law; not by an irreversible, but by a reversible tribunal; not by a tribunal which makes its own law, but by a tribunal that obeys the law as made. In this way we maintain two fundamental maxims. The first is, that while to facts answer juries, to the law answers the court. The second, which is still more important, is, *Nullum crimen, nulla poena, sine lege*. Unless there be a violation of law pre announced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment." 5 *South. Law Review*, 366, August-September, 1879.

It seems to us, therefore, that under a proper construction of the clause of the constitution now under consideration, the practical result is simply to secure to the jury, by the fundamental law, the right to render a general verdict under an indictment for libel, as in other cases; and this because such right had not only been questioned, but absolutely denied and refused by the courts in England. It was, therefore, quite natural that such right, deemed so important to the liberty of the citizen, should be placed beyond further question by an express provision of the organic law. Under this view all the protection designated to secure the liberty of the citizen is obtained, for after a general verdict of acquittal no new trial can be had (*State v. Gathers*, 15 *S. C.*, 370), and at the same time not only the anomaly, but the gross injustice, of trying a man by a special law enacted for his case by the jury who are called upon to try him, is avoided; and, on the contrary, he is tried by the established law of the

land, as declared by those entrusted with that duty, just as a person charged with any other offence.

From this it follows that it is not only the right, but the duty, of the presiding judge, upon the trial of indictments for libel, to declare to the jury the law applicable thereto, and if he errs in so doing, such errors may be reviewed on appeal, just as in any other case, unless the defendant is acquitted, when, under a well settled principle of the common law, now incorporated in our constitution, "no person, after having once been acquitted by a jury, shall again for the same offence be put in jeopardy of his life or liberty." *Constitution*, article I., section 18.

We proceed, then, to inquire into the several grounds of appeal. And first as to the motion in arrest of judgment. Such a motion must be based upon some defect apparent upon the record, and cannot be sustained simply upon the ground of variance between the *allegata* and *probata*. This is fully shown by the cases cited in the solicitor's argument. *State v. Creight*, 1 *Brev.*, 169; 2 *A. D.*, 656; *State v. Heyward*, 2 *Nott & McC.*, 312; 10 *A. D.*, 604; *State v. Graham*, 15 *Rich.*, 310; *State v. Cockfield*, *Ibid.*, 316; *State v. Hamilton*, 17 *S. C.*, 462. It will be observed that the several grounds upon which the motion in arrest of judgment is based, all rest upon the allegation that the evidence was insufficient to sustain the charge as laid in the indictment, and not upon any defect in the indictment itself. They all assume that the charge as laid would have been unexceptionable, provided the evidence had been of a different character. In other words, they impliedly admit that an indictment for libel upon a private individual need not necessarily contain an allegation of the intent to provoke a breach of the peace, but that such an allegation and such proof is only necessary where there is no publication except to the person libelled; and inasmuch as there was no evidence in this case (as was contended by the appellant) of any publication by the defendant to any person except the prosecutor—the person alleged to have been libelled—the indictment upon which the defendant has been convicted was insufficient, and the judgment should, therefore, be arrested.

This, however, is more an objection to the sufficiency of the evidence than to the sufficiency of the indictment. It is like the

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case of the *State v. Graham, supra*, where, under an indictment for obstructing a public landing, and the proof being that the public road leading to the landing was obstructed at a point about one hundred yards from the landing, it was held that this constituted no ground for a motion in arrest of judgment, but was a good ground for a new trial. Or like the case of the *State v. Cockfield, supra*, where the indictment was for stealing a plough, and the evidence was that the article stolen was a ploughshare, where a similar ruling was made. Or like the case of the *State v. Hamilton, supra*, where the indictment charged the goods stolen to be the property of one person, when the proof showed them to be the property of another; it was held that while this might have furnished a good ground for a motion for a new trial, it afforded no ground for a motion in arrest of judgment. It will be observed that in all three of these cases the indictments were unexceptionable, and might have been sustained under a certain state of the evidence. And so here, under the assumption above alluded to, the indictment, under certain proof, could have been sustained, and hence there is no ground for arrest of judgment.

These remarks are based upon the assumption that an indictment for a libel upon a private individual, which has been published abroad—to other persons than the one libelled—need not contain an allegation of any intent to provoke a breach of the peace, though we are inclined to think that this assumption, which we must admit seems to be supported by authority, is not well founded in reason. For when it is remembered that one of the essential elements in a libel of a private individual is its tendency to provoke a breach of the peace, and that the criminal law takes cognizance of it solely for that reason, and not for the purpose of protecting the good name and fame of private individuals (1 *Bish. Crim. Law*, §§ 591, 734; 2 *Ibid.*, § 909), it would seem to follow logically that every indictment for a libel upon a private individual should contain an allegation of this essential element of the offence. But this is a question not made or argued in this case, and we do not propose to decide anything as to it.

The only contention on the part of the appellant is, that where there has been no publication abroad, as it is termed—that is, to

the public generally—or to persons other than the one alleged to have been libelled, then it is necessary that the indictment should contain an allegation that the libel was sent to the party libelled with intent to provoke a breach of the peace. This position seems to be well supported by authority. In 3 *Chitty on Criminal Law*, 871, it is said: "Though there be no publication, yet the sending a letter to the party himself, filled with abusive language, is indictable, because it tends to provoke him to a breach of the peace in order to revenge the insult he has received; but then if there be no publication to a third person, the indictment must allege an intention to provoke the prosecutor to a breach of the peace," citing *Rex v. Wegener*, 2 *Stark.*, 245, which seems to be a leading case on the subject. And again, at page 875, this eminent author says: "Where there has been no publication of the libel to the third person, or the publication cannot be proved, and the libel has been sent to the prosecutor himself, it is necessary that the indictment should state that the paper was written or sent to the party libelled with the intent to provoke him to a breach of the peace." And in the form, given at page 889, for an indictment for writing and sending a letter to the prosecutor, accusing him of theft (precisely this case), we find the allegation of the intent to provoke the prosecutor to a breach of the peace.

It would seem, therefore, to be settled that where there has been no publication except to the person libelled, the indictment must contain an allegation that the libel was written or sent with intent to provoke a breach of the peace; and so the Circuit Judge instructed the jury in this case, but he added that if the letter was given to the wife by the prosecutor to be read by her, from the necessity arising from the prosecutor's being unable to read, simply with a view to inform himself of the contents of the letter, that would be a sufficient publication of the libel to a third person by the defendant to warrant his conviction under this indictment. This instruction on the part of the Circuit Judge as to the publication was excepted to by the defendant, and constitutes one of his grounds of appeal. In *Fonville v. McNease* (*Dud.*, 303), the testimony showed that the alleged libel was in the form of a letter, sealed and addressed to the prosecutor or Miss Susan Sloan, which was dropped in an enclosure near

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plaintiff's house; that it came into the possession of the plaintiff with the seal unbroken, and that he opened it and read it aloud to his family and others. It also appeared, just as in this case, that the plaintiff, in a public place, in the presence of others, mentioned the fact of having received such a letter, stating the contents, and that defendant avowed himself the author of the letter. Upon a motion for non-suit the court held that there was no *prima facie* evidence of publication by the defendant, and granted the motion.

It will be observed that the present case is identical with that just cited, except that there the plaintiff published the letter himself by reading it to the witness and his family, while here it was read by the wife of the prosecutor, *at his request*, because of his inability to read. There the court said that the publication was the act of the plaintiff, and not of the defendant, and it seems to us that the same remark may be made here. True, here the prosecutor did not read the letter himself, but it was read by his request, and it was, therefore, as much his act as if he had himself read it. He, and not the defendant, caused the publication to be made. The fact that the prosecutor was unable to read, and must therefore necessarily call in the aid of some third person, in the absence of any testimony tending to show that the defendant knew of the prosecutor's inability to read, cannot affect the question. In this respect this case differs materially from the case of *Delacroix v. Thevenot*, 2 Stark., 63. There the defendant knew that the plaintiff's clerk was in the habit of opening and reading his letters, and hence when the defendant sent the libellous letter to the plaintiff, which was opened and read by the clerk, it was held to be sufficient proof of publication by the defendant, upon the well settled principle that a man is presumed to intend the natural and probable consequences of his acts. That case, as O'Neill, J., says in *Fonville v. McNease*, constitutes an exception to the rule that sending a sealed letter, containing libellous matter, to the party himself, is no evidence of publication, and the exception rests upon the knowledge of such facts as would induce a person to believe that the contents of the letter would reach a third person.



But without such knowledge there is no foundation for the exception.

It seems to us, therefore, that in the absence of any evidence whatever tending to show that the defendant knew of prosecutor's inability to read, it was error to instruct the jury that the giving of the letter by the prosecutor to his wife to read because of his inability to do so, was such a publication as would render the defendant responsible under this indictment. It may be that the defendant, if he had known that the prosecutor could not read, and would therefore be compelled to call to his aid some third person in order to acquaint himself with the contents of the letter, would not have sent it. At all events, we do not think he can be held responsible for an act which he did not do, and which there is no reason to suppose he intended should be done; for one can scarcely be said to have intended the consequences of an act, when he had no knowledge of such facts as would necessarily, or even probably, lead to such consequences. The very fact that he employed a *sealed* letter as the vehicle of his charges against the prosecutor would seem to indicate that they were intended for his eye alone, and not for that of the public, as otherwise he might have used much more effectual means to effect his end.

It is quite true, as said by O'Neill, J., in *Fonville v. McNease*, that there is a great distinction in respect to publication between an indictment and a civil action for libel, the object of the former being to prevent a breach of the peace, and hence a publication to the party himself is sufficient, while the object of the latter is to repair the damage done to a man's reputation, and hence a publication to third persons is necessary; yet inasmuch as we have seen that this indictment, failing to contain any allegation of an intent to provoke a breach of the peace, can only be sustained by proof of publication to third persons, it becomes essential to inquire into the sufficiency of such publication, and hence the case of *Fonville v. McNease*, though a civil action, becomes authority in this case. It seems to us that the Circuit Judge erred in his instructions to the jury as to what would be a sufficient publication of the alleged libel, *under this indictment*, and that upon this ground the case must go back.

The judgment of this court is, that the judgment of the Cir-

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cuit Court be reversed, and that the case be remanded to that court for a new trial.

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RAMAGE v. RAMAGE.

Where one person pays the purchase money and another procures the deed to be made to him, if the insertion of his name was fraudulently procured, no title or interest vests in him, and if done by permission of the purchaser, a trust results for him who paid the purchase money.

Before FRASER, J., Edgefield, March, 1886.

The opinion states the case.

*Messrs. Norris & Folk*, for appellant.

*Messrs. Gary & Evans*, contra.

June 26, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. It seems that many years ago Peterson Borum died intestate, seized of a tract of land containing 650 acres, leaving a widow, Sarah (who afterwards intermarried with one J. W. Ramage), and some other heirs, as to whom there is no very clear statement, but among them were W. S. Boyd, Hezekiah Boyd, Thomas Boyd, and Virgil Borum. We gather from the Brief (the case was not argued, but submitted) that the widow, Sarah (entitled to one-third of the land), afterwards intermarried with one J. W. Ramage, and in 1870 died intestate, leaving as her heirs and distributees her said husband, J. W. Ramage, and six children, viz., Laura Ramage, C. P. Ramage, Millie Ramage, Mary Ramage, John C. Ramage, and N. E. Edwards (the last, we suppose, by representation). These proceedings were instituted by the surviving husband, J. W. Ramage, and some of the children, for partition of the aforesaid tract of land, involving not only the interest of the parties in the one-third inherited by the widow, Sarah, but also as to the interest of the other heirs of Borum to the remaining two-thirds.

There was no difficulty, except as to the ownership of the two-thirds, which descended to the heirs of Borum. None of them appeared to claim in their own right; but it seemed to be conceded that they had sold their interest to some of the Ramage children, and the main question in the case was to whom that interest had been sold and conveyed. Mary Ramage and her sister, C. P. Ramage, offered in evidence a deed of the land to them, bearing date January 16, 1882, from W. J. Boyd, Hezekiah Boyd, and Virgil M. Borum, executed by W. J. Boyd for himself and as attorney in fact for the other parties, regularly recorded February 22, 1883. John C. Ramage answered that the two-thirds interest had been previously conveyed by W. J. Boyd as attorney in fact to Mary Ramage and himself in consideration of one thousand dollars (but really \$900), which was paid by himself alone, with the understanding that his sister Mary was to purchase the interest of other heirs, &c. But that the said Mary Ramage and her sister, C. P. Ramage, fraudulently and collusively obtained from the said W. J. Boyd, attorney in fact, &c., a second deed to themselves as grantees, dating the same back to the time when the first deed was executed; and he prayed that the second deed to Mary Ramage and C. P. Ramage should be set aside as fraudulent and void.

The cause was first heard by Judge Witherspoon, who, considering that the case was not ready for a final decree, referred the cause to the master "to take further testimony as to the interests of W. S. Boyd, Hezekiah Boyd, and V. M. Borum in the two-thirds of the land, as well as to the authority of W. S. Boyd to convey said two-thirds interest under power of attorney; and as to the contents of the deed (first) claimed to have been executed by W. S. Boyd at Leesville, S. C., to Mary Ramage and John C. Ramage, and delivered to said Mary Ramage by A. P. West in January or February, 1882, &c. That said master do notify Mary Ramage, C. P. Ramage, and John C. Ramage of the reference to be held under this order, and take additional testimony on behalf of either of the parties, and report the same," &c.

Under this order the master took the testimony of Mary Ramage and that of W. J. Boyd by commission. Mary Ramage tes-

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tified "that Mr. Boyd delivered to her a paper purporting to be a deed, but that it was *not accepted*. It was to be returned if not satisfactory—contents not looked into until his departure. As soon as it was examined sent Mr. Boyd word it was not satisfactory, and would not be accepted as a deed. He was to return in a short time, but did not. About a year after witness went to Georgia, and this deed (in proof) was executed to witness and her sister (C. P. Ramage). The first deed was to witness and John C. Ramage. Returned the first deed to Mr. Boyd—objected to the deed because it was not properly executed, and it was to J. C. Ramage. He was not to have any interest in it, and had improperly had his name inserted. Did not see the deed was to her and John C. Ramage before Mr. West probated it. Paid Mr. Boyd every dollar of the money with her own hands. Not a dollar of it was paid by J. C. Ramage. Paid him (Boyd) before he went to Leesville when he was to make the deed. \* \* \* Would not return the first deed till he repaid the money or made a proper deed. There was no understanding that J. C. Ramage was to be a party named in the first deed. Never agreed that he was to be party, only on condition that C. P. Ramage would consent for him to take her place. She objected, and witness did not consent. \* \* \* Not a dollar was the money of J. C. Ramage. Every dollar was witness' own money," &c.

W. J. Boyd testified: "That he contracted with Miss Mary Ramage, and had no transaction or conversation with John C. Ramage, who did not pay him a cent. John C. Ramage first told me that Miss Mary Ramage desired the deed made to him. In accordance with this information I made the deed to him. Afterwards when I presented the deed to Miss Mary Ramage she refused to accept it and I had to make another deed to her. All the negotiations for the sale of the land and purchase thereof were between Miss Mary Ramage and myself. He was authorized to make the deed, being a part owner of the land, and having a power of attorney from the other joint owners. Some time after the execution of the first deed, which had been made to the wrong party, the second deed was dated back to the time of the execution of the first."

The cause again coming on for trial with this additional testi-

mony, Judge Fraser held "that parties coming for partition were not required to show their title to the land. If there is any defect of title, they will not be required to expose it, or to defend their title until assailed by others. They must, however, show so much of their title as is necessary to inform the court of the proportions to which they are respectively entitled. Both parties here claim under the heirs of Peterson Borum, and under Boyd acting for himself and the other heirs, and as between them I think Mary Ramage and C. P. Ramage are entitled, to the exclusion of John C. Ramage, to the two-thirds interest which belonged to the Borum heirs," &c.

From this decree John C. Ramage appeals to this court. The exceptions are long and numerous, and are in the Brief. The points made, however, in the argument of counsel are reduced to four, as follows :

First. "That Judge Fraser's decree is in conflict and overrides that of Judge Witherspoon upon the only question before him, to wit, the sufficiency of the proof of title by the plaintiff in the case, which had been referred back to the master for further proof upon that question alone, which was never produced. In this Judge Fraser committed error in deciding it not necessary," &c. As we understand it, Judge Witherspoon did not undertake to make any decree at all upon the merits, but gave his reasons for declining to do so—that the evidence was too meagre and unsatisfactory, referring the whole case back, only indicating certain points as to which especially further proof was necessary. As to the parties before the court, the additional proof offered was important and conclusive of the case.

Second. "That W. J. Boyd having signed the first deed as attorney for the parties, instead of signing the names of the grantors, through W. J. Boyd, attorney, that therefore the first deed was void. The execution of the power of attorney, we admit, was defective as decided in the cases of *Webster v. Brown & Hammett*, 2 S. C., 428, and *De Walt v. Kinard*, yet in equity it is a good execution of the power, and will vest the equitable title in the grantees *Welsh v. Usher*, 2 Hill Ch., 167." Judge Fraser did not rest his decree upon the defective execution of the first paper, claimed to be a deed, but upon the ground that the pur-

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chase money was paid by Mary Ramage, "and if the conveyance was made in whole or in part to John C. Ramage, it was done in derogation of her right, and that whatever title John C. Ramage took he holds for her benefit, and that she has either a constructive or a resulting trust in her favor," &c.

Third. "The grantees under the second deed had knowledge of the first deed, and by destroying the first deed and procuring a second deed after the lapse of a year, and after J. C. Ramage had gone into possession of the land under the first deed, they perpetrated a gross fraud on the rights of John C. Ramage, which, in equity and good conscience, should not be sustained, &c. See *Sheorn v. Robinson*, 22 S. C., 32." Even if the first paper purporting to be a deed had been regularly executed by Boyd, the attorney in fact, and had been accepted by the grantee, which is stoutly denied, we cannot well see what rights John C. Ramage could acquire in premises paid for exclusively by his sister Mary, simply by having his own name inserted in the deed as one of the grantees, and taking possession of the land. If he had his name inserted improperly and without authority, the deed as to him was simply void. If he had authority to do so, he holds for his sister, who paid the purchase money.

Fourth. "The individual interest of W. J. Boyd was conveyed under the first deed, and the mere returning of it to Boyd, and the taking of the second by Mary Ramage, did not revest the title to that interest in Boyd, so as to be conveyed by the second deed. The first deed was good and valid, so far as the interest of Boyd was concerned." As it seems to us, the conclusive answer to this is, that no interest, legal or equitable, could vest under a deed procured by misrepresentation and executed to the wrong person. But if properly and fairly obtained, it raised a resulting trust in favor of his sister Mary, who paid the purchase money.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

## WHILDEN &amp; CO. v. PEARCE.

1. Exceptions should state specifically the errors complained of.
2. Findings of fact by master and Circuit Judge approved.
3. Defendant mortgaged land and chattels to secure advances not to exceed \$3,000, and the mortgage stipulated that the mortgagees should have "a lien on all crude turpentine, rosin, and spirits of turpentine to be made or controlled by" the mortgagor during the year; and the mortgagor further covenanted that he would ship all his naval stores to the mortgagees to be sold by them on commission, the proceeds of sales to be applied to the payment of advances made by the mortgagees. *Held*, that the naval stores were not mortgaged, there being no words of conveyance as to them, nor was this instrument an agricultural lien.
4. The mortgagor having shipped naval stores to the mortgagees without any direction as to the application of payment, the mortgagees had the right to apply the proceeds of sale to advances made by them in excess of the \$3,000 secured by the mortgage.

Before FRASER, J., Kershaw, February, 1886.

The opinion sufficiently states the case.

*Mr. J. T. Hay*, for plaintiffs.

*Mr. W. D. Trantham*, contra.

June 28, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. In October, 1883, the defendant, Pearce, executed and delivered to the plaintiffs a mortgage of two tracts of land, a turpentine still and fixtures, and of certain horses and mules therein named, for and in consideration of advances to be made to him for the year 1884, to an amount not exceeding \$3,000, to be paid on or before November 1, 1884, with interest at the rate of ten per cent. per annum from the date of said advances, to enable the said Pearce to carry on the business of farming and manufacturing naval stores in Sumter County. The mortgage also contained the following provision; "And I do further give to said W. W. Whilden & Co. a lien on all crude turpentine, rosin, and spirits of turpentine to be

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made, manufactured, or controlled by me during the year 1884; and I do further covenant and agree to ship to said W. W. Whilden & Co. all naval stores to be manufactured or controlled by me during said year, the same to be sold by them on commission, according to the custom of merchants of Charleston, S. C.; the net proceeds of said sales to be applied so far as the same may be necessary, to the payment of advances made to me by said W. W. Whilden & Co.," &c.

The plaintiffs advanced money and supplies so liberally, that on March 1, 1884, the defendant was indebted to them in the sum of \$2,910, which, with interest, was about the amount specifically secured by the mortgage. The defendant, without any other instructions as to the application of the proceeds, forwarded some naval stores, which were sold by the plaintiffs, and they continued to make further advances, the monthly advances exceeding the receipts from the stores sent, until the latter part of October, when they refused to make further advances, and, applying the receipts from the stores to the unsecured advances in excess of the \$3,000 covered by the mortgage, claimed that the defendant was indebted to them in the sum of \$3,522.10, of which \$3,275 was of the mortgage debt proper and interest, and the remainder, \$247.10, was still a balance of the unsecured advances.

Thereupon the defendant notified the plaintiffs to come up and take charge of "the stock, still," &c., and, in accordance with this request, they sent one Chapman as their agent, to whom the defendant gave an instrument of writing as follows: "I, J. E. Pearce, do hereby deliver over to Messrs. W. W. Whilden & Co., all goods and chattels, personal property, and choses in action, included in my mortgage to them, &c., and hereby authorize and empower the said W. W. Whilden & Co., &c., to sell and dispose of all or any part of said personal property at public or private sale, and without advertisement." But Chapman, finding that all the property around the still and barrel timber in the woods had been attached as the property of the defendant, at the instance of one C. W. Humphreys, got actual possession only of the property included in the mortgage, viz., still, stock, and two wagons and harness. This property he sold at public auction by



an auctioneer, and credited the net proceeds of sale on the general account of the plaintiffs, who then instituted these proceedings to foreclose the mortgage on the two tracts of land, for the payment of the balance of the \$3,000.

The defendant insisted that the whole of the proceeds of sale of the naval stores should be applied upon the note for \$3,000 secured by the mortgage; and that under the paper purporting to deliver to the plaintiffs all the personal property included in the mortgage, they should be held responsible for certain barrels of rosin and "scrape" crude turpentine, lot of barrel timber in the woods, and also "the turpentine in one hundred thousand boxes," &c., and, these items of property being accounted for, he alleged "by way of defence that he had paid said mortgage debt in full," &c.

The issues were referred to the master, J. D. Dunlap, Esq., who took the testimony and stated the accounts. He held, that the naval stores having been forwarded without special instructions, the plaintiffs had the right to apply the proceeds of sale to the unsecured advances made in excess of the mortgage debt; but that the proceeds of the personal property, still, stock, &c., regularly covered by the mortgage and received and sold by the agent of the plaintiffs for \$340.73, should be credited on the mortgage debt proper for \$3,000, reducing the amount of the same to \$2,646.54 on August 14, 1885, for which the mortgage should be foreclosed on the lands. He held also that the plaintiffs, never having had actual possession of the crude turpentine on the yard, "stuff in the woods," &c., were not responsible for the value thereof. Upon exceptions to this report, the cause was heard by Judge Fraser, who concurred with the master in all respects, except in reference to the application of the proceeds of the sale of the naval stores sold by the plaintiffs, as to which he directed that they also should be credited on the note for \$3,000 specifically secured by the mortgage, leaving the advances in excess of that sum unsecured. From this decree both parties appeal to this court.

EXCEPTION OF PLAINTIFFS.—"That his honor erred in adjudging that the proceeds of all shipments made by the defendant to plaintiffs should be credited to the account of \$3,000 and interest,

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instead of holding and deciding that the plaintiffs had the right to apply the payments as they have done."

DEFENDANT'S EXCEPTIONS.—"I. Because his honor erred in that he held that the plaintiffs did not take into their possession and were responsible for all of the property that was covered by his lien and mortgage, which was in existence on November 1, 1884, at which time the defendant turned over all of said property to W. H. Chapman, as the agent of the plaintiffs. II. Because his honor erred in that he held that the plaintiffs were not responsible for the value of the 'crude turpentine and the stuff in the woods;' and that such value should not be entered as a credit against any balance that may be due the plaintiffs by the defendant," &c.

As to the exceptions of the defendant, we agree with the Circuit Judge, that "they are not sufficiently definite as to the property referred to by them. On an examination of the report and the testimony in the case, I do not see sufficient evidence that there was any property covered by the mortgage and the written agreement to take possession and sell without advertisement, which the plaintiffs either did not sell and properly account for, or which they made themselves liable for by neglecting to take possession of and sell and account for. There is no evidence that plaintiffs ever agreed to carry on the operations of the turpentine farm," &c. Besides, in regard to the articles of property which were not in existence at the time the mortgage was executed, but as to which the defendant simply declared a lien, and covenanted to ship to the plaintiffs during the year, we will speak hereafter.

The most important question in the case is, whether the plaintiffs were bound by law to apply the proceeds of all the naval stores sold by them during the year to the mortgage debt proper for \$3,000, and thus cancelling the same, to leave the advances made in excess of that amount entirely unsecured. There can be no reasonable doubt that the debt is due to the plaintiffs, but the precise point is whether the plaintiffs, having a mortgage for \$3,000, were bound to apply the proceeds of the naval stores to that part of their debt which was already secured, leaving the advances in excess of that sum unsecured. It is well settled that

if a creditor has more claims than one against the same debtor, who makes a payment without at the time directing to which debt it shall be applied, the creditor himself may make the application. When these naval stores were forwarded, no special directions were given as to the application of the proceeds of sale, and if this were all, there could not be a doubt about it.

But it is urged that mortgaged property must be applied to the mortgage debt, and that these "stores" were embraced in the mortgage as additional collateral security for the \$3,000, and the proceeds of the sale should therefore have been applied exclusively to that debt. Were these stores legally mortgaged to the plaintiffs? It is true that they were referred to in the mortgage deed, and it would have been easy to have added them to the list of other personal property which was mortgaged to secure the \$3,000; but with seeming purpose, they were not so included. These stores were not then in existence, and in reference to them the defendant did not attempt to convey any interest or estate present or in the future, but simply declared a lien and covenanted to ship to the plaintiffs "all crude turpentine, rosin, and spirits of turpentine to be made, manufactured, or controlled by me during the year 1881." We cannot say that this constituted such a legal mortgage of the articles to come into existence in the future as to authorize the plaintiffs to seize and appropriate the same. "Words denoting conveyance or transfer are essential." See *Green v. Jacobs*, 5 S. C., 283; *Jones on Chattel Mortgages*, sections 8, 12, and 18, and authorities.

Nor do we think that the stipulation in the mortgage deed can be considered as an agricultural lien. That law, as it declares, was manifestly intended to favor and encourage the cultivation of the soil, and the court cannot extend its provisions so as to cover by analogy a case like this. Besides, if this could be considered as substantially an agricultural lien, the requirements of that law were not complied with. See *Cureton v. Gilmore*, 3 S. C., 47; *Sternberger v. McSween*, 14 Id., 35; *Kennedy v. Reames*, 15 Id., 552.

But if there was no regular mortgage or agricultural lien covering and controlling the "naval stores," they were certainly mentioned in the mortgage deed, and it is insisted that such men-

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tion itself in that deed was an implied direction that the proceeds of sale should be applied only to the \$3,000 *covered and secured by that mortgage*. The defendant at that time could have so directed, but did he do so? The words are, "to be sold by them (plaintiffs) on commissions, &c.; *the net proceeds of said sales to be applied, so far as the same may be necessary, to the payment of advances made to me by said W. W. Whilden & Co.*" It will be observed that the words are not "to the *aforesaid advances*" (meaning the \$3,000 secured by the mortgage deed), but general, "*to the advances made to me by the said W. W. Whilden & Co.*"

We cannot think that these general words should be absolutely controlled and limited by the statement in the mortgage that the advances were "not to exceed the sum of \$3,000." The fact is, that the advances were not so limited; other and further advances were made, and the proceeds of the naval stores were applied to such advances, and it seems to us that such application was in compliance with the express terms of the stipulation contained in the mortgage deed. It certainly was not in violation of the words used, and, as we conceive, was in accordance with the *intention* of the parties. After the full amount of \$3,000 had been already advanced—filling the mortgage security to overflowing—the plaintiffs were under no obligation to advance further; and it is not to be lightly assumed that the defendant could have accepted or the plaintiffs would have continued to make additional advances, if the proceeds of the naval stores then being forwarded were to be applied in payment of the mortgage debt proper, leaving the advances then being made entirely unsecured. It seems to us unreasonable to suppose that the parties could have so understood it.

The judgment of this court is, that the judgment of the Circuit Court be so modified as to credit the proceeds of the "naval stores" upon the advances in excess of the \$3,000 secured by the mortgage; and that in all other respects it be affirmed.

WILMINGTON, COLUMBIA & AUGUSTA R. R. COMPANY v.  
GARNER.

Complaint for the recovery of land is not bad on demurrer for failing to allege a right in plaintiff to the possession of the premises, the complaint having stated that the plaintiff was seized in fee, and that the defendant unlawfully withheld from plaintiff the possession thereof.

Before PRESSLEY, J., Richland, November, 1886.

The opinion sufficiently states the case.

*Mr. R. A. Lynch*, for appellant.

*Messrs. Barron & Ray*, contra.

June 28, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. In this case the plaintiff, respondent, brought action against the defendants, appellants, to recover possession of certain real estate, of which it alleged it was seized in fee, and the possession of which being in the defendants, they unlawfully withheld from the plaintiff. The defendants demurred on the ground that it appeared upon the face of the complaint, that said "complaint did not state facts sufficient to constitute a cause of action." The position taken to support the demurrer was that there should have been in the complaint an allegation that the plaintiff was entitled to the possession of the premises claimed, and such allegation not appearing on the face of the complaint in distinct and positive terms, it was defective to the extent of failing to state facts sufficient to constitute a cause of action. The demurrer was overruled by his honor, Judge Pressley, with leave to answer over. The appeal of defendants questions this order of Judge Pressley.

In support of this appeal appellants' counsel relies upon the two following legal propositions: 1st. "It is a general rule that a plaintiff can offer no testimony, except as to such facts as he has alleged in his complaint. 2d. A plaintiff in an action for the recovery of land cannot recover, unless he has not only the

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legal title, but also the right to the immediate possession of the land sued for, it being a possessory action, and possession being the gist of the action."

These propositions are doubtless sound, but it does not follow from these that in such actions a failure to allege in distinct and positive terms a right to immediate possession, in addition to seizure in fee and an unlawful withholding by the defendant, would be a fatal omission, subject to demurrer for the want of a cause of action, for the reason that, in our opinion, the allegation of seizure in fee and the unlawful withholding of possession by the defendant from the plaintiff is substantially an allegation of the right to immediate possession, certainly sufficiently distinct to save the complaint, especially under the code practice, which, departing from the cumbrous and technical forms previously in existence, requires only a plain and concise statement of the cause of action. And admitting, for the sake of argument, that it must appear in the complaint that the plaintiff not only has title, but is entitled to the immediate possession, we think the allegations here, admitted as they are by the demurrer, are sufficient. An averment by a plaintiff that he has the legal title to certain real property, as owner in fee simple, it seems to us, in the absence of any opposing right, set up by way of defence, would, in itself, *prima facie*, be an averment of the right to possession on the principle that title ordinarily carries with it the right to possession, which right is a conclusion of law inferred from the title in fee, and, therefore, not necessary to be stated in terms as an allegation of fact.

But whether the allegation of a fee simple title would be sufficient *prima facie* or not without the allegation in some form of the right to immediate possession, we think, in this case, such latter allegation is substantially made in the complaint, wherein it is alleged that the defendants are in possession, and that they unlawfully withhold said possession from the plaintiff. We cannot see how the defendants could unlawfully withhold possession from the plaintiffs, unless said plaintiffs were entitled thereto. The demurrer, in admitting that they unlawfully withheld the possession from the plaintiff, substantially admits that the plaintiffs have a right to said possession. It was not decided in *Geiger v.*

*Kaigler* (15 S. C., 276), cited by appellants' counsel, that it was necessary to allege in terms in the complaint in actions of ejectment that plaintiff was entitled to the possession. Mr. Justice McGowan, in delivering the opinion, did say, "that a plaintiff in an action for the possession of real property could not recover, unless he has not only the title, but the right to immediate possession"—quoting from *Tyler on Ejectment*, 738, as follows: "In an action of ejectment, the question to be tried is the plaintiff's right to possession of the premises sued for, and upon the trial of the general issue the *defendant* may avail himself of a *defence*, that the plaintiff had not the present right of possession." But nothing was adjudged as to the precise form in which it should appear in the complaint, that the plaintiff had the right to immediate possession. There is an intimation in some of the cases discussing this question, that inasmuch as a fee simple title ordinarily carries with it the right to possession, the allegation of such title dispenses with the necessity of claiming an inferior and subordinate interest, such as the right to possession, and that the proof of the fee simple will be sufficient to demand possession *prima facie*, and in the first instance throwing the burden upon the defendant to show the absence of the right to immediate possession.

It is not necessary, however, here to adjudge this question, and we pass it by, inasmuch as we think there is a sufficient allegation in this complaint as to the right to possession. The cases from Indiana, relied on by appellant, to wit, *Vance v. Schroyer*, 77 Ind., 501; *Miller v. Shriner*, 87 Id., 141; *Mansur v. Streight*, 103 Id., 359, were decided under a statute of that State, which required expressly that the allegations suggested should be inserted in the complaint. The case from California, *Payne v. Treadwell*, 5 Cal., 312, seems to support the appellant. But *contra*, see the case of *Walter v. Lockwood*, 23 Barb., 233, and the cases there cited. Even in Indiana, notwithstanding the express requirement of the statute as to the mode of alleging an immediate right to the possession, it was held that the averment of facts showing this right would be sufficient. *Mansur v. Streight*, 103 Ind., 339, *supra*. We think this is the better doctrine.

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It is the judgment of this court, that the order below be affirmed.

## WHITMAN v. BOWDEN.

1. Nine owners of contiguous lots united together for the purpose of erecting for themselves in severalty nine stores, with upper stories arranged for a hotel to be owned by them as common property. *Held*, that the general relation between these parties was that of an ordinary partnership.
2. Neither the relation of partners held by three of these parties, nor their position as a committee of the partnership to obtain bids, prevented them from openly and fairly contracting with the others to erect this building.
3. But this committee having put in a bid in a fictitious name for an amount which they had learned would be accepted by the association, and, upon its acceptance, having sublet the contract to strangers at a lower figure, and then procured an assignment of their bid to these strangers, with a secret agreement that the difference should be repaid to them by the builders, it was *held* that these three partners were liable to their copartners for six-ninths of the sum thus received by them.
4. This arrangement "leaked out," and the other parties, while expressing dissatisfaction with this agreement, continued to pay their proportion of the amounts called for by the building contract. *Held*, that the injured partners were not thereby estopped from enforcing this claim, nor did their payments operate as a confirmation of the rights secured by the defendants to themselves in the subletting contract.

Before HUDSON, J., Spartanburg, January, 1886.

The opinion states the case. The Circuit decree, omitting its statement, was as follows :

The learned referee in this case has found from the evidence and the law controlling the case, that the plaintiffs are entitled to recover six-ninths of the \$2,500 with interest on so much of the respective instalments from the date of each payment. To his able report I must refer for a full statement of the facts found and conclusions of law. I do not think, however, that he is sus-



tained in his judgment by the law and the facts. The fundamental error is in regarding the defendants as standing in a fiduciary relation to the plaintiffs. They were charged with no special duty in this matter, except to call for bids. They were not delegated to find the lowest bidder and to close a contract with him. They were not entrusted with any special duty, except to advertise for bids. The bids were to be sealed, and in that state submitted to the company and not to the committee. The advertising was faithfully and efficiently done. They had no knowledge of the terms of any bid until they were all opened at a full meeting of the company. All were rejected and more bids were called for. At this second call, Maxwell, Lyman & Land put in a bid. The defendants, apprehending that the enterprise might fail, agreed to put in a bid at low figures and take the risk of profit and loss in the enterprise. This they did under the name of A. E. Simmons & Co., a brick manufacturing firm in Spartanburg. They knew nothing at all of the figures of other bids to be put in. Not a particle of evidence was adduced going to impeach the good faith of this move of the defendants—none of whom are mechanics, but merely business men with capital.

This bid was duly considered by the company with the others and accepted as the best and lowest bid of all. Surely, it cannot be said that after this any fiduciary relation existed between the company and these members whose bid was accepted. It was their clear right and duty, after this, to bestir themselves and seek a contractor to enable them to comply with this bid, which really had prevented the main enterprise from failing. It was, furthermore, their clear right to make the best terms possible for themselves in subletting the contract, just as it would have been their clear right to make all the profit possible had they hired workmen and themselves furnished the material and superintended the work.

When they went to the meeting of the company to execute their contract in due form, they then disclosed the identity of A. E. Simmons & Co., and brought their sub-contractors with them. All was revealed except the price at which they had sublet the contract, and no questions were asked on this score. This was no one's business or concern except their own. They were

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under no duty or obligation to reveal it. The papers were signed directly by Maxwell, Lyman & Land, and the defendants became their bondsmen; and their's, the lowest bid, fairly made, and understandingly and fairly accepted, was put into the proper shape for practical performance of the contract. Betwixt the company and the defendants in this transaction we fail to discern such relation as exists between parent and child, guardian and ward, principal and agent, trustee and *cestui que trust*. It was a plain, legitimate transaction between intelligent business men.

A company can contract with a member or members to do work for it, and the ones thus employed enjoyed the privilege of fairly and honestly making a profit out of the job, provided it be fairly and honestly obtained. In such a transaction the contracting parties stand towards each other, not as fiduciaries, but as strangers, subject alone to the laws of honesty and good faith in performing the contract. This seems to have been recognized by the members of this company, who, after being informed of the fact that the defendants had sublet at a profit which they were realizing out of the instalments being paid to Maxwell, Lyman & Land, made no complaint, but voluntarily continued to pay the instalments until the work was completed, even after this suit was begun. Surely, then, these intelligent men, knowing all, and still voluntarily paying, cannot now be permitted to invoke the aid of the law to compel the defendants to refund. If they deemed the matter a fraud and imposition, they should have refused to pay one dollar over and above the \$20,000; and should have asked the court to protect them in so refusing.

A man *sui juris*, intelligent and experienced in business, who voluntarily pays money which, with a full knowledge of all the facts, he believes to be an unjust demand, cannot be permitted to ask the court to correct his blunder and compel a repayment. If the defendants had been guilty of bad faith, fraud, and collusion in procuring the bid and effecting its transfer to M., L. & L., and after a full knowledge of these facts, the company had voluntarily made payment and thus sanctioned the wrong, the courts could not relieve them. But not only was no fraud perpetrated in securing the bid, but it was done in good faith and without collusion with any one, and practically resulted in saving the

enterprise from failure. The defendants underbid all competitors, secured the contract, and caused the building to become an accomplished fact. If they made profit instead of loss, the company should not complain. Had the defendants lost in the enterprise, they would have had to bear it. Having gained, they are entitled to the profit.

Taking this view of the law and the facts, I hold that the referee has erred in his judgment. It is therefore adjudged and decreed, that the defendants' exceptions to the report of the referee be sustained, and that his judgment be reversed, the complaint be dismissed, and the defendants have judgment for costs.

*Messrs. Carlisle & Hydrick*, for appellants.

*Messrs. Duncan & Sanders* and *J. S. R. Thomson*, contra.

June 28, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiffs and the original defendants, nine in number, being the several owners of nine adjacent lots in the city of Spartanburg, organized themselves into a company known as the "Merchants' Hotel Company," for the purpose of building nine store rooms, to be owned separately by the owners of the respective lots, and above them a hotel, to be owned and rented for the common benefit. The organization was effected in January, 1879, by the election of a president, secretary, treasurer, and a building committee. A resolution was adopted that each member should pay one-ninth of the cost of the building. It is stated in the complaint that the defendant, R. L. Bowden, and W. W. Thompson, since deceased, were appointed on the building committee, and in the testimony it is stated that Dr. Heinitch, representing plaintiff, Dr. Dean, acted with this committee.

This building committee was instructed to advertise for bids, which being done and certain bids having been received, the company met to open and consider them. They were found too high, and were rejected and ordered to be returned to the bidders, with a request that they be reduced. In the meantime some informal conversation was had on the question of the amount

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the company would be willing to give, and it was ascertained that some of the members, if not all, would be willing to allow \$22,500. Other bids were received, and the company again met on March 13. Among the bids then presented was one in the name of A. E. Simmons & Co. of \$22,500. This included some extra work not embraced in the plans and specifications. Inquiry was made as to who composed the firm of A. E. Simmons & Co. The defendants declined to tell; assurance, however, was given that it was composed of responsible persons, and that they could give a good bond to complete the work. On motion of Mr. Thompson, the contract was awarded to A. E. Simmons & Co., the lowest bidders, and the building committee was instructed to draw up a contract between the company and A. E. Simmons & Co.

It turned out that A. E. Simmons & Co. was a myth as to the name, and that the bidders under this name were the defendants, Bowden and Thompson, building committee, and Harris, who, after the contract was awarded to them as above under the name of A. E. Simmons & Co., sublet it to Maxwell, Lyman & Land (contractors in the city), ostensibly at their bid, but really at \$20,000, Maxwell, Lyman & Land having assigned \$2,500 of the contract to Bowden, Harris, and Thompson. This arrangement was at first kept secret from the company. After this, however, the company was informed of the facts, as to the parties composing the imaginary firm of A. E. Simmons & Co., and it was asked to transfer the bid to Maxwell, Lyman & Land, at the same price and upon the same conditions. This was consented to, the defendants saying that they would sign the bond of Maxwell, Lyman & Land. The plaintiffs, however, did not know at this time that defendants had transferred their bid to Maxwell, Lyman & Land at \$20,000, the excess, \$2,500, to be retained by them. This latter fact, however, after this became known, and although there was some expression of dissatisfaction, yet there was no formal action taken by the company, and the members continued to pay each his proportion of the building contract at \$22,500.

The structure was finally completed, but not by Maxwell, Lyman & Land. They were settled with, however, upon the basis of their contract, they accounting for the unfinished work, about

\$800, which, with other payments, amounted to \$22,500, of which the defendants received \$2,500; and this action was brought by the plaintiffs against Bowden, Harris, and Thompson, since deceased, demanding judgment that the defendants be required to refund to the plaintiffs the several amounts paid by them in excess of the amounts they were bound to pay under the contract made with Maxwell, Lyman & Land, &c.

The referee, William Munro, Esq., to whom the case was referred, after full testimony taken, reported as his conclusion of law, that the plaintiffs were entitled to share equally with the defendants, Bowden, Harris, and the estate of Thompson in the \$2,500—\$1,666.66 being the amount thereof to which the plaintiffs were entitled, with interest from certain dates; and he recommended that plaintiffs have judgment for said amount with the interest to be ascertained by the clerk. This report was overruled by his honor, Judge Hudson, who reversed the judgment of the referee and ordered that the complaint be dismissed with costs. Plaintiffs have appealed upon sixteen exceptions, which are as follows:

I. In holding that the defendants had procured Maxwell, Lyman & Land to undertake the contract after they had failed to get other contractors to take the bid for \$22,500.

II. In holding that the defendants "were charged with no special duty in the matter except to call for bids; that they were not delegated to find the lowest bidders;" that "they were not entrusted with any special duty except to advertise for bids."

III. In holding that no fiduciary relation existed between plaintiffs and defendants after the bid of A. E. Simmons & Co. was accepted or before.

IV. In holding that there was no collusion between defendants and Maxwell, Lyman & Land to make a profit for the former.

V. In holding that the defendants acted in good faith in the transaction with their copartners.

VI. In holding that plaintiffs were estopped by their conduct.

VII. In holding that it was a plain, legitimate transaction between intelligent business men.

VIII. In not finding that the defendants stood in a fiduciary

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relation to the plaintiffs, both before and after the bid of defendants was accepted.

IX. In not finding that the defendants concealed from their copartners facts which would have controlled their action in making the contract.

X. In not finding that the defendants took advantage of their knowledge derived from their copartners, of the amount which would be paid for the building contract, and used such knowledge to their own advantage and to the injury of plaintiffs.

XI. In not finding that the defendants procured the removal of S. B. Ezell, one of the original plaintiffs, from the office of secretary of the association, for the purpose of concealing from the plaintiffs their purpose to make profit for themselves from the contract.

XII. In not finding that it was the duty of the defendants to give to the association of which they were members the benefit of any contract which they could make to the advantage of the association.

XIII. In not finding that a bond for \$500 for the performance of a \$22,500 contract was in itself *prima facie* evidence of an intended fraud upon the plaintiffs.

XIV. In not holding that the failure of the defendants to complete the building was a breach of the condition of their bond.

XV. In not finding that the defendants are liable to plaintiffs for at least the value of the work which Maxwell, Lyman & Land failed to do under their contract.

XVI. In not finding that the report of the referee should be affirmed in his conclusions both of law and fact.

We think these exceptions may be condensed into, and discussed under, the following propositions: 1st. Did his honor err in failing to hold that such a fiduciary relation existed between the defendants and the plaintiffs as forbade the defendants from making the contract complained of, and especially under the circumstances of secrecy, &c., attending said contract? And 2nd. Were the plaintiffs estopped by their conduct, as held by his honor?

We think the general relation between these parties was that of an ordinary partnership. They had united themselves together,

without a charter, however, for the purpose of erecting a building, a large portion of which was to be common property, and to be used as a hotel for common benefit, the members agreeing to pay each an equal proportion of the cost of said building, and no doubt to share equally in the rental profits of the hotel. This made them a partnership and they bore to each other the relation of partners. In addition to this general relation, which all of the members of the company sustained to each other, Bowden and Thompson, having been appointed a building committee, occupied the relation of agents to the company, for the discharge of such duties as might be required of them, in having the building erected. Now, were these relations, one or both, of such a fiduciary character as to bring the defendants under that well established equity doctrine, that a trustee cannot make profit out of the estate or property of his *cestui que trust*—that doctrine which vacates a purchase by a trustee from himself, regardless of the fact whether fraudulent or not, which declares illegal and forbids any such purchase without inquiring into the question whether or not it has been *bona fide*? *Fox v. Macreth*, 1 *Lead. Cas. Eq. (Wh. & T.)*, 115. Without considering now the special circumstances under which the defendants obtained the building contract, the case presents the fact that three of the copartners, the defendants, did obtain such a contract from the firm. Is there any law which forbids one partner from being employed by the firm to do the work of the firm? Does the relation of partners stand in the way of and prevent one partner from contracting with the firm to perform any special employment or work required by said firm for partnership purposes? We know of no such law. On the contrary, it has been held in this State, that the mere relation of partners does not forbid a contract by one partner with the firm, and that such contract, if *bona fide* and free from fraud, will be sustained. *Glenn v. Caldwell*, 4 *Rich. Eq.*, 175.

Next, what was the character of the relation of agency which existed between these parties? It seems that Bowden and Thompson were constituted a building committee when the company was first organized. What were the precise duties of this committee, does not appear in the testimony. It only appears

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that they were instructed at one time to advertise for bids, which duty they performed, in response to which several bids were made. These bids having been rejected as too high, this committee was instructed to make another effort. Upon this second call for bids, the defendants put in one, which was lower than any former bid, and lower than any made then. This bid was accepted. The agency of Bowden and Thompson in this matter consisted in getting bidders. In the performance of this duty, why could they not bid themselves, after opening the bidding to the public? We cannot see that the relation arising from this limited agency could of itself have prevented them from bidding openly and in their own name. And if under such circumstances such bid had been accepted, the contract certainly could have been enforced on both sides. We conclude, then, that the mere fact of the defendants being partners with and agents of the plaintiffs, would not be sufficient in themselves to sustain plaintiffs' claim.

But the question now arises, did the defendants act in good faith? Did they observe that fairness and fidelity to the common interest which the relation of partners and agents demanded at their hands? For while it may be true that partners and agents may not be absolutely precluded from dealing with the firm and the principal, yet such dealing is not entirely at arms' length, as may be the case with contracts between strangers. On the contrary, the utmost fairness is required. There should be no *suppressio veri* or *suggestio falsi*. The confidential relation which exists between such parties demands entire good faith and perfect frankness, and where these are absent, the contract should not be upheld; not so much on account of any actual fraud or injury which may have been committed, but because of opening the doors thereby and thereto. *Pars. Part.*, §§ 223 *et seq.*; *Pom. Eq. Jur.*, §§ 901 *et seq.*; *Story Eq. Jur.*, §§ 206 *et seq.*

Now, what are the facts of this case? Bowden and Thompson and Harris bid under a fictitious name, and they bid the exact amount which, from being members of the firm, they had learned the firm would ultimately be willing to give. Why did they conceal their own names? They must have had some purpose. They not only concealed their own names, but when the bid was presented, and the question was asked who composed Simmons & Co., they



replied that said firm was composed of responsible persons, thus leading their partners to suppose that they were outside parties. They must have concealed their names because they thought that the contract would not be awarded to them otherwise. And it was on motion of Thompson that they obtained the contract. They made the bid under a fictitious name, and then as members of the firm, in the meeting called to consider the bids, they used their influence to have their bid accepted. After this they sub-let the contract to Maxwell, Lyman & Land for \$2,500 less than what they were to receive from the firm, by a contract which was a secret and expressly agreed to be kept secret. True, they afterwards informed the firm that they composed A. E. Simmons & Co., and obtained permission to have the contract made with these parties, Maxwell, Lyman & Land; but they still suppressed the fact that they were to retain the \$2,500, and the contract was made out with Maxwell, Lyman & Land for \$22,500.

If this building committee could make a contract for themselves at \$20,000 with Maxwell, Lyman & Land, why could they not have made such a contract for the firm of which they were a part, and for whose common interest every member thereof, impliedly at least, was under obligation to work? The fact that these defendants made such an advantageous arrangement for themselves with Maxwell, Lyman & Land, so soon after they had obtained the contract, is a strong circumstance to show that, with a little effort on the part of the building committee, said arrangement might have been made with Maxwell, Lyman & Land for the firm in the first instance, when the first bids were returned with the request that the bidders might reduce their bids.

It seems that the firm never did learn directly from the defendants the true character of the contract between them and Maxwell, Lyman & Land. It "leaked out," however, as it is said, and notwithstanding this, the parties all continued to advance their proportion of the contract money at the \$22,500; and this is claimed to have estopped the plaintiffs from questioning the transaction—which is the next question in the case. The ordinary doctrine of estoppel by conduct cannot apply here, for the reason that the defendants have in no way been injured, nor

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induced to take action, nor put in any worse position by any act of the plaintiffs.

It is said, however, that there was a confirmation of the contract made with the defendants, and of the sub-letting thereof to Maxwell, Lyman & Land. This is true, and after this confirmation the plaintiffs were perhaps bound, so far as Maxwell, Lyman & Land were concerned, but this did not include the assignment by Maxwell, Lyman & Land of the \$2,500. The contract to Maxwell, Lyman & Land was for \$22,500, and the assignment was kept secret. This being utterly unknown, it cannot be said to have been then confirmed. Nor can the subsequent payments of their proportions by the different members have the effect of such confirmation. As we have said, they had consented to the transfer of the bid of the defendants to Maxwell, Lyman & Land, and by the contract made with these latter parties they had obligated themselves to pay the contract price, which was \$22,500, and the continued payment of their proportion of that sum cannot be held as a confirmation of the arrangement made between Maxwell, Lyman & Land and the defendants. There is no evidence that any official information was ever given to the firm of this arrangement. Nor does it seem that it was known or suspected until the building was under way, and when it became known, although the parties continued to pay the assessments, dissatisfaction was expressed. We do not think that payment under these circumstances can operate as a confirmation.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for such proceedings as may be required to enable the plaintiffs to recover six-ninths of \$2,500, with interest from proper dates, to be ascertained by reference or otherwise, as by the Circuit Court may be deemed best.

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PETRIE v. COLUMBIA & GREENVILLE R. R. COMPANY.

1. In settling a case for appeal, the Circuit Judge may state his rulings and the facts bearing upon the exceptions taken, even as to matters not disputed by opposing counsel.

2. Statements made by the employees of a railroad company, on the train, after the killing of a person on the track, are not admissible to prove negligence in such killing, these statements not being part of the *res gestae*, nor declarations of agents within the scope of their agency.
3. Plaintiff has the right at any stage of his examination of witnesses, to call for the reading of the testimony of a witness produced by defendant and examined and cross-examined before a notary public under the act of 1883. A refusal by the Circuit Judge to accord this right, is good ground for vacating an order of non-suit.
4. The order in which a party shall adduce his testimony, when competent, should be left to the judgment of the party and of his counsel.

Before HUDSON, J., Spartanburg, September, 1886.

The opinion states the case.

*Mr. J. S. R. Thomson*, for appellant.

*Messrs. Duncan & Sanders*, contra.

June 29, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This action was brought by the plaintiff, as administrator of Margaret W. Petrie, to recover damages in behalf of her children, for injury sustained by them by reason of her death, which was alleged to have been caused by the negligence of the defendant company. The testimony on the part of the plaintiff tended to show that the deceased was quite an old widowed lady, residing with her son-in-law, very near the track of the railroad company, and that she was killed by a passenger train while attempting to cross the railroad track near the house in which she resided. In the progress of the testimony the plaintiff proposed to offer in evidence the testimony of a witness which had been taken by a notary public, at the instance of the defendant, under the provisions of the act of 1883, when, according to the notes of the stenographer, the court ruled as follows: "I don't think you can introduce testimony that was taken by the defence, and is a part of the defence at this time. If there be any evidence of that sort in court, and the opposite party do not use it, then that is different." To which ruling the plaintiff duly excepted. The plaintiff also proposed to ask a witness who was

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on the train when the disaster occurred, what she heard the railroad employees say, which, upon objection, was ruled out, the court saying: "You can't bind the company by what one of its employees would say after an occurrence. I rule that the declarations of an agent, made in the due course of his agency, are binding upon the principal, but that the declarations of one of these employees after the event is not competent." To which exception was likewise taken.

At the close of the testimony, the defendant's counsel moved for a non-suit on three grounds: 1st. Because there was no evidence of negligence on the part of defendant. 2nd. Because if there was, there was none that such negligence was the cause of the injury complained of. 3rd. Because there was no evidence of any injury resulting from intestate's death which would entitle plaintiff to recover. The Circuit Judge granted the motion, for the reasons at first given orally and subsequently reduced to writing, where he says: "I granted the non-suit, principally upon the latter ground, remarking at the time that upon the question of negligence there might possibly be found a scintilla of evidence. But upon reflection I now think there was not even a scintilla of evidence." He then goes on to discuss the grounds upon which the motion was rested and reached the conclusion above stated.

From this judgment plaintiff gave notice of appeal upon the several grounds set out in the record, in which error is imputed to the Circuit Judge in refusing the application to read the testimony of the witness taken at the instance of the defendant; in rejecting the testimony as to the declarations of the railroad employees; and in holding that there was no evidence of negligence, and no evidence of any such injury as would entitle the plaintiff to recover.

When the "Case" for appeal was prepared and served, sundry amendments were proposed by respondent, and the Case being submitted to the Circuit Judge, he made an order in writing, allowing the proposed amendments, in which he took occasion to make the following remarks in reference to the two exceptions to his rulings in regard to the testimony: "After the train had passed the crossing some distance, a passenger, Permelia Daw-

kins, heard the train hands speak of the killing (at least, it was so alleged), and the plaintiff's counsel proposed to ask the witness what these hands or employees said. I ruled that declarations after the event made by employees were not admissible to bind the company, not forming a part of the *res gestae*, and not having (been) made in the due course of agency.

"The plaintiff's counsel, in the midst of the development of his testimony, proposed to introduce the testimony of a Mrs. Neighbors, which had been taken by a notary public, in accordance with the act of 1883, by the defendant, to be used on the trial for the defence. She had been examined and cross-examined by the counsel in the case. This was objected to by the counsel for the defence. There was very little said—no argument of consequence—and I held it to be irregular at that time, but stated that if the defendant's counsel should fail or refuse to introduce it, the plaintiff could do so. The plaintiff's counsel excepted, the evidence progressed, and the matter was not again referred to. If, when the plaintiff closed and the defendant moved for a non-suit, the request to introduce the evidence had been renewed, it would have been granted. In fact, then was the time to have made the request; but it was not made. I would have made the suggestion again to the plaintiff's counsel, as I had at first intimated, but supposed that my previous intimation was understood, but that the counsel deemed it unimportant.

"At the time this motion was made, I regarded it equivalent to a request that the plaintiff should at that stage have asked that the defendant should introduce and examine a witness *in aid of plaintiff's case*, and allow the plaintiff to cross-examine her, for such would have been the practical effect of at that time reading the testimony of a witness, who before the trial had been examined in chief by the defendant and cross-examined by the plaintiff. The true rule, as I understand it, when the written testimony of a witness is in court, whether taken by commission or otherwise, is that the opposing party can demand of the party in whose behalf the evidence has been taken, to have the testimony read in its regular order, and if he fails or declines to introduce it, then the opposing party can do so. So likewise, if a non-suit be moved for at the close of the plaintiff's case, he can call for

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the additional written testimony before the motion is heard, if he deems it necessary to do so; and such a request I would have granted."

To these remarks of the Circuit Judge, embraced in his order settling the Case, or "to the last mentioned decree of the presiding judge," as styled by counsel for appellant, the plaintiff served the following additional grounds of appeal, alleging that his honor erred: 1. In filing any decree whatever except as to the amendment of Brief proposed by defendant. 2. In stating additional facts not proposed by respondent and not embraced in report of stenographer.

It seems to us that there was neither error nor impropriety on the part of the Circuit Judge in taking occasion, when the Case was submitted to him for settlement, to explain fully what occurred in the tribunal whose judgment we are called upon to review, and to vindicate, if he sees fit to do so, the judgment appealed from. It is of the utmost importance that an appellate tribunal should be informed exactly how the questions presented arose, and when the opposing parties cannot agree, there must necessarily be some final arbiter, and the Circuit Judge has very properly been made such. Experience shows that even the notes of the stenographer cannot always be safely relied upon, and we are satisfied that in some cases the Circuit Judges have been greatly misrepresented—unintentionally, of course. So far, therefore, from the course pursued by the Circuit Judge being objectionable, we regard it as positively desirable, and would be glad to see it adopted whenever practicable, as we could then feel assured that we were reviewing what the Circuit Judge *actually* decided, and not what he is *represented*, sometimes incorrectly, to have decided.

We proceed, then, to a consideration of the grounds of appeal, and first, as to the propriety of rejecting the declarations of the railroad employees. There is no doubt as to the general rule that declarations of third persons are not admissible, and to bring these declarations within the exceptions to such rule, it would be necessary for the party proposing to use them to show, first, either that they were a part of the *res gestae*, or that they were made by some agent of the party against whom they are offered,

in the course of such agency. It seems to us clear that, whether we take the statement from the stenographer's notes or from the remarks of the Circuit Judge in his order settling the Case, the plaintiff failed to lay the proper foundation for the admissibility of such declarations. He did not show that they were a part of the *res gestae*, nor did he show that they were made by an agent in the course of his agency, and we think, therefore, that they were properly excluded.

Next, as to the refusal to allow the plaintiff to read the testimony of Mrs. Neighbors, taken under the provisions of the act of 1883 by a notary public. Testimony so taken, so far as the present question is concerned, must be regarded as standing upon the same footing as that taken by a regular commission. The act provides, "that in addition to the methods for taking testimony now provided by law," the mode provided for by the act may be resorted to. This language seems to place testimony so taken in the same category with testimony taken by the other methods previously provided for, one of which was by commission, to which the mode prescribed in the act is very similar, and should therefore, as far as practicable, be governed by the same rules. The rule in reference to testimony taken by commission was laid down in the case of *Walton v. Bostick* (1 *Brev.*, 162), in the following language: "Where parties join in a commission to take the examination of witnesses, and the commission is returned into court, either party may move for publication, and neither can object to it. Both have an interest in the evidence thus procured; and the court having possession of it, will allow both parties the benefit of it." This rule was subsequently recognized in *Pulaski v. Ward* (2 *Rich.*, 119), and seems to be now well settled, as we know of no case in which it has been questioned.

This being the rule, the practical inquiry is, whether it was violated in this case. Although the Circuit Judge seems to have recognized the rule, yet we think he erred in its application. According to his view the plaintiff had no right to avail himself of the testimony until after the defendant had manifested an intention not to use it, either by moving for a non-suit, or by declining to introduce it when it came his turn to offer testimony.

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This view is based upon the assumption that the party, at whose instance the testimony has been taken, has the prior and superior right to use it, and that the right of his adversary does not arise until he has declined or waived his prior right. We know of no authority for such a qualification of the rule. It certainly cannot be found in the terms of the rule, as stated in the case cited, where it was formulated in a distinct resolution, indicating that it was carefully prepared and fully stated. On the contrary, the language used—"either may move for publication, and neither can object to it. Both have an interest in the evidence thus procured; and the court having possession of it, will allow both parties the benefit of it;"—so far from implying that either has the prior or superior right, would rather seem to place both on the same footing. But, in addition to this, such a qualification of the rule might, under the rules of evidence respecting the reply, wholly exclude a party from the use of the testimony embraced in a commission. It might be that a plaintiff, relying on the rule, would go to trial expecting to prove some primal fact in his case by the testimony contained in the commission, and if the defendant should decline to read the commission, and offer no testimony as to such fact, then, under the rules regulating the reply in evidence, the plaintiff would be wholly excluded from the benefit of the testimony taken by commission, although the rule distinctly declares him entitled to the benefit of it.

Again, we can see no good reason why the application of a plaintiff to publish a commission, if made before a motion for non-suit is submitted, should be refused, and yet granted after such motion is made. Indeed, subject to the right of the court to determine whether certain testimony is competent before certain preliminary facts are established, and subject to the rule regulating the reply, we are not aware of any authority on the part of the court to prescribe the order in which a party shall adduce his testimony, or at what stage of the case any competent testimony shall be introduced. On the contrary, that is a matter which should more properly be left to the discretion and judgment of the party or his counsel. The case of *Mathews v. Heyward* (2 S. C., 239), cited by counsel for respondents, and the authorities therein referred to, together with the subsequent



cases of *State v. Clyburn* (16 S. C., 375), and *Sheppard v. Traders' National Bank of Boston* (23 Id., 601), only decide that it is within the discretion of the Circuit Judge to permit the introduction of additional testimony, in furtherance of justice, at any stage of the trial; but they do not establish the right of the Circuit Judge to prescribe at what time and in what order a party must adduce his testimony.

We think, therefore, that the Circuit Judge erred in the application of the rule by qualifying it as he did, and for this reason the case must go back for a new trial. For it is quite clear that the plaintiff's counsel was not allowed to introduce the written testimony of Mrs. Neighbors at the time he desired to do so, and when, in our judgment, he was entitled to introduce it, although it now appears, from the remarks of the Circuit Judge in the order settling the Case, that he would have been allowed the privilege of offering this testimony *after* the motion for non-suit had been made, if he had *then* made the application. In addition to the fact that we think the judge erred in ruling that the testimony could not be offered until after the motion for non-suit had been made, it is quite manifest, from the statement contained in the stenographer's notes, that the counsel supposed, and had good reason to suppose, that under the ruling of the judge he would not be permitted to offer the testimony until after the defendant had closed his case without using it, although it now appears that the ruling of the judge really was that he might offer the testimony after the defendant had manifested an intention not to use it by making the motion for non-suit. So that, by reason of the erroneous qualification of the rule the plaintiff was in fact deprived of a substantial legal right.

Under this view it is not necessary, and would be scarcely proper, to enter into any discussion of the grounds upon which the motion for a non-suit was based, as it would be merely a speculative discussion; for upon a new trial the evidence, as to these points, may be of an entirely different character.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded to that court for a new trial.

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## ADKINS v. ATLANTA &amp; CHARLOTTE AIRLINE RAILWAY COMPANY.

1. A brakeman voluntarily transferred from a freight train to work the hand-brakes of a passenger train, whose air-brakes were out of order, and whose platforms were slippery with ice, but with skilled officers and employees in charge, was thrown or fell from the train while in motion and was killed. *Held*, that the railroad company was guilty of no negligence.
2. Failure of the engineer to blow on brakes would not render the railroad company liable for an injury which was not the result of such failure.
3. Section 1525 of General Statutes requires a railroad company to give immediate notice of accidents attended with injury to person, to the nearest physician and to the railroad commissioners, and prescribes a forfeiture for failure to do so, but does not declare by whom recoverable. Has this section any application to an action brought by a person so injured or his administrator to recover damages for such injury?
4. A brakeman, seen on the train after leaving a station, was missed at the next stopping point, but supposed to be on the engine. When it was learned that he was not there, the conductor telegraphed inquiries to the station where the absent brakeman was first missed, and to headquarters, and inquiries were made along the line on the return trip. *Held*, that it was not the duty of the railroad company to institute search for the brakeman's body along the line of its track.

Before HUDSON, J., York, April, 1886.

The opinion states the case.

*Mr. S. P. Hamilton*, for appellant.

*Messrs. Duncan & Sanders*, contra.

June 29, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This was an action brought by the plaintiff, as administratrix of Oliver Adkins, deceased, to recover damages for the injury sustained by her as the wife of the deceased and by his father by reason of his death, caused, as alleged, by the negligence of the defendant company.

The testimony shows that the plaintiff's intestate was in the

employ of defendant as brakeman on a freight train, and that on the evening of January 9, 1884, he, with two others, were detailed to take out a special passenger train from Charlotte to Atlanta, under the direction of a conductor by the name of Holt. This train, it seems, was some five hours behind its schedule time in reaching Charlotte, and though supplied with air-brakes, the same were not in working order, and hence it became necessary to use the hand-brakes, to which duty the deceased and one Jarrott, with whom he had been working as fellow-brakeman on the freight train, were assigned. The night was excessively cold, with continued falls of snow, by which the platforms of the cars were covered with ice and made very slippery. The train proceeded without accident or trouble, except that some ineffectual attempts were made to use the air-brakes, which, however, were finally abandoned at Seneca, from which point reliance was placed solely on the hand-brakes.

The deceased was last seen very soon after leaving Westminster, but it did not appear that he was missed until the train reached Tacona,<sup>1</sup> where some search and inquiry was made for him in the baggage car, where he ought to have been, by his fellow-brakeman Jarrott, who, however, thinking that he had gone forward to ride on the engine, as the train hands sometimes did, made no further search, and said nothing about his disappearance. But when the train reached Gainesville and it had been ascertained that the deceased was not on the train, the conductor telegraphed to Tacona to inquire about him, and also to headquarters in Atlanta reporting his disappearance. Not being able to learn anything of him, they renewed their inquiries along the road as they returned that evening from Atlanta, but still were unable to hear anything of him. Nothing was heard of the deceased until a few days afterwards—the Circuit Judge saying it was on January 12, while counsel for appellant contends it was on the 15th—when his dead body was found lying in a ditch near the railroad track at a point near the 104 mile post.

It seems that at or near this point there is a steep grade and a reverse curve in the railroad track, in passing which the deceased was thrown or fell from the train. The body, when found,

<sup>1</sup> The train did not stop between Westminster and Tacona.—REPORTER.

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was frozen stiff, as well as the clothes in which the deceased was dressed, but his hat was found at some little distance from the point where the body was found at an embankment, and his clothes and shoes were covered with "shining mica sand," similar to that found in the embankment. The body presented no external marks of injury, except a bruise or cut over the right eye, and there was no evidence that any of his bones were broken, though it does not appear that any examination, except of the most casual character, was made. The hands were clutched, as if grasping something, "and were muddy with shining dirt." The body was found by the section master of the railroad in charge of that part of the line, and his hands, and after being dressed in a new suit of clothes, bought from a neighboring store, and paid for by the railway company, was sent to Charlotte, and thereafter being provided with a suitable coffin, forwarded to Chester for interment.

At the close of the plaintiff's testimony the defendant moved for a non-suit, which was granted, upon the ground that the plaintiff had failed to adduce any evidence tending to establish the charge of negligence. From this judgment the plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as the sole question for us to consider is whether the Circuit Judge erred in holding that there was no evidence tending to establish the charge of negligence. The negligence imputed to the defendant by the appellant is of two kinds: First, in causing the disaster by negligent conduct of their agents. Second. Negligence in not ascertaining more promptly the condition of the deceased after the disaster occurred, and contributing to his relief.

We have examined the testimony carefully, and are unable to discover the slightest evidence of any negligence on the part of the railway company, or any of its employees, which could by any possibility have contributed towards causing the disaster complained of. There is no testimony tending to show that there was any want of skill or care on the part of the conductor, the engineer, or any of the other employees, in the management of the train, unless it be on the part of the deceased himself, who, when rebuked by the conductor for not putting on the brake,

with which he was charged, just before reaching Westminster, whereby the train ran past that station before stopping, and accused of being asleep, made no denial or reply. But even this occurred before the accident happened, and could not have had any agency in causing it. The fact that the air brakes were not in working order, and the ineffectual attempts to use them, cannot possibly be regarded as negligence contributing to the injury, for the very fact that the air-brakes were out of order was the only reason why the deceased and his fellow-brakeman, Jarrott, were put upon the train; and the undisputed testimony from the plaintiff's own witness was, that the attempts to use the air-brakes ceased at Seneca before the train reached the point where the accident occurred.

The fact that the deceased was transferred from his post as brakeman on a freight train to a similar position on a passenger train, cannot help the plaintiff, for all the witnesses examined as to this point concur in saying that the former position was more dangerous than the latter; and the facts which they state, that the brake on a freight train is operated from the top of the cars, where there is no railing or other protection to the brakeman to keep him from falling, or being thrown off by the motion of the train, while the brake on a passenger train is operated from the platform of the car, where there is a railing which serves as such protection, conclusively show that the witnesses were right in saying that the post to which the deceased was transferred was not only not more, but actually less dangerous than the position for which he was regularly employed. But in addition to this the plaintiff's own testimony not only shows that the deceased voluntarily assumed the duty of brakeman on this train, but that he was anxious to do so; for there was not only the testimony of both Jarrott and Price that the deceased seemed to be anxious to go as brakeman on the train, which is objected to in the argument as merely the opinions of these witnesses, but there was also this distinct statement by the witness Price, in speaking of the deceased: "I heard him say he was glad to get to go out, as he hadn't been making very much that week, and we were all glad to make a run of that kind"—giving as a reason that they were paid by the run.

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The fact that the platforms of the cars were slippery on account of the ice found upon them, cannot be imputed as negligence to the company which would make it liable for the disaster which occurred, for that was a defect or peril which was perfectly obvious to the senses, the hazards from which the deceased voluntarily assumed. As was said in *Hooper v. C & G. Railroad Company* (21 S. C., at page 547), adopting the language of Pierce in his work on railroads: "A servant who, before the injury, had knowledge of the defect in the road or machinery, or who, having a reasonable opportunity to inform himself, ought to have known such defects, is presumed, by remaining in the company's service, to have assumed the risks of such voluntary exposure of himself, and cannot recover for an injury resulting therefrom. \* \* \* This rule applies with special force where the defect or danger is obvious to the senses." Now, certainly the slippery condition of the platform was perfectly obvious to the senses, and the deceased must necessarily be regarded as having voluntarily assumed the risk incident thereto.

Again, it is urged that the failure of the engineer to give the signal to put on the brakes at Chaugee Hill was such negligence as would make the company liable. In the first place, there is no evidence that the engineer failed to give the signal. The most that can be said is, that the witnesses examined as to this point could not say whether the signal was given or not. In addition to this, it is difficult to conceive what agency the failure to give the signal could possibly have in producing the kind of accident which actually occurred. On the contrary, it would seem that the failure to "blow on brakes" would have induced the deceased to have remained in the baggage car, where he would have been safe from the disaster which actually did happen; for if he had remained in the baggage car, he could not possibly have been thrown or have fallen from the platform outside, as it is assumed, and very properly assumed, he must have done. So that even if there were any evidence (although we have not been able to discover any), that the engineer neglected to give the signal for "down brakes," this would not make the company liable for the disaster which actually did occur, as there could be no possible connection between the negligence proved and the injury sus-

tained. For, as was held in *Glenn v. C. & G. R. R. Co.* (21 S. C., 466), to recover damages for an injury done to a party by another, the plaintiff must not only produce evidence of negligence by such other, but also that the injury complained of was the result of such negligence. Now, if it had appeared that by reason of the failure of the engineer to give the proper signal to put down the brakes, the train had run down the steep grade and around the curves at such an undue rate of speed as to throw the train from the track, whereby the deceased was injured or killed, then that would have been a case in which the injury actually sustained could have been referred to the negligence proved. But in this case, even assuming for the sake of the argument that the engineer failed to give the proper signal, we are unable to perceive any possible connection between such negligence and the disaster which actually occurred. In addition to all this, the testimony shows that the deceased was distinctly instructed by his more experienced fellow-brakeman, Jarrott, when to put on the brakes on Chaugree Hill, and that certainly was more effective than a signal by the blowing of a whistle.

As we have said, we are unable to discover any evidence whatever tending to show any negligence which could have possibly had any agency in causing the disaster complained of.

Our next inquiry is, whether there was any evidence of negligence on the part of the company or its agents in making proper efforts to find the deceased after the disaster occurred and in administering to his relief. On this branch of the case the counsel for appellant relies upon the provisions of section 1525 of General Statutes, which reads as follows: "Every railroad corporation shall cause immediate notice of any accident which may occur on its road attended with injury to any person to be given to a physician most accessible to the place of accident, and shall also give notice within twenty-four hours to the railroad commissioners of any such accident, or of any accident falling within a description of accidents, of which said commissioners may, by general regulation, require notice to be given. For each omission to give such notice the corporation shall forfeit a sum not exceeding one hundred dollars."

It will be observed that a specific penalty for a failure to com-

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ply with the provisions of this section is prescribed, but by whom to be recovered—whether by the State, the railroad commissioners, or by the party injured—is not stated; and therefore it might be a question whether this section has any application to a case like the present, where the action is for damages. But waiving this, inasmuch as the question was not made in this case, and assuming for the purpose of this inquiry only, without deciding either one way or the other, that a failure to comply with the provisions of this section would constitute such negligence on the part of a railroad corporation as would entitle the party injured, or in case he was killed, his administrator, to recover damages for the injury thereby sustained, let us inquire whether there was any evidence in this case of a failure on the part of the defendant company to comply with the provisions of this section of the General Statutes.

Counsel for appellant argues that “this provision involves *immediate* search for the injured person, and the burden of proof is thrown upon the company to *show extraordinary diligence* in using every resource at its command to succor the injured person.” But to say nothing of the fact that we are unable to discover anything in the act throwing the burden of proof upon the railroad corporation, the provision necessarily involves the idea that the corporation knew, or at least ought to have known, that there has been an accident attended with injury to some person; for certainly one cannot be regarded as in fault for not giving notice of a fact which he neither knew nor ought to have known. Now, in this case there is no evidence that the company knew that there had been any accident attended with any injury to a person until the dead body was discovered, when everything seems to have been done by the employees of the company which the ordinary feelings of humanity would dictate.

But it is urged that the company was negligent in not instituting prompt and proper search for the body of deceased as soon as it was discovered that he was missing from the train. It will be remembered, however, that there was no evidence tending to induce a belief that any accident had occurred. The train had not run over an animal or other obstruction. It had not been thrown off the track. In fact, nothing whatever had occurred to



excite a suspicion that any one had been injured. According to the testimony, the train had gone down the grade and around the curves at Chaugee Hill in the usual way, with nothing to attract the attention of those who were in charge of it, as indicating that there was anything unusual; not even any evidence of any unusual jolting or swaying of the cars in going around those curves. Nothing whatever but the simple fact that it was eventually discovered that the deceased was not on the train; but at what precise point on the road this discovery was made, does not distinctly appear. For although he was missing from his proper place when the train reached Tacoa, it is very manifest that no one suspected then that he had been thrown, or fallen off, at Chaugee Hill, for the conductor at first supposed that he had been left at Westminster; but when informed by Jarrott that he had seen him after leaving that point, they evidently then concluded that he had gone forward to ride on the engine. But when the train reached Gainesville and the deceased could not be found on any part of the train, the conductor at once commenced making inquiries by telegraph to Tacoa, and perhaps other points, notifying the headquarters in Atlanta of his disappearance. These inquiries were repeated along the road upon the return trip and nothing was heard of him.

So that the inquiry is narrowed down to this: Ought the company to have known that the deceased had fallen or been thrown from the train, whereby he was injured or killed, simply because he was known to be on the train at Westminster, and was not on the train when it reached Gainesville, or whatever other subsequent point on the road it was discovered that he was missing from the train, in the absence of any evidence whatever that anything had occurred to the train in the interval between those points calculated to induce a belief that a person had been thrown from the train? The fact that an employee of a railroad company is known to be on the train at a certain point and is missing from the train at a subsequent point many miles distant, is certainly not sufficient to affect the company with knowledge of the fact that such person was either killed or injured by an accident on the road between those two points, especially when there is no evidence whatever that any accident

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had occurred to the train in the interval between such points, and, on the contrary, the evidence shows that the train ran as usual between those points, with nothing exceptional or peculiar to attract the attention of those charged with the management of the train. The absence of a person under such circumstances might, and most naturally would, be accounted for in some other way than by supposing that he had been injured.

But, in addition to this the testimony, in our judgment, adduced by the plaintiff himself, so far from tending to show that there was any undue delay in prosecuting the search for the body of the deceased, shows the contrary. The deceased went out on the train which left Charlotte about 9 o'clock in the evening of January 9, and the evidence shows that the disaster which cost him his life occurred in the early hours of the morning of the 10th—between 12 o'clock and daylight. In addition to the inquiries made by the conductor by telegraph that night, or rather morning, inquiries were made along the road on the return trip of the train on the evening of the 10th, and the testimony of the plaintiff's witness, Mason, tends to show that the body was found some time during that day; for after saying that he had sold a suit of clothes to one Williams, an agent of the railway company, as a burial suit for Oliver Adkins, which was paid for by the company, he says: "The said suit was sold on January 10, 1884, I think, and charged, by order of L. S. Williams, to Richmond & Danville R. R. Company on January 12, 1884." Again he says: "I saw the dead body at 104 mile post on the morning of January 10, 1884, I think," and then goes on to speak of seeing Williams and the other employees dressing the body in the new suit of clothes.

The only testimony tending to show that the dead body was not found until the 15th (if, indeed, it be such), as contended for by counsel for appellant, is that of Kennedy, the brother-in-law of deceased, who says: "I think the dead body of Adkins was returned to Charlotte on January 15, 1884." This, besides being indefinite, is entirely inconsistent with the testimony of Mason, the merchant who sold the clothes, and who was asked to speak from his books, and who said distinctly that the clothes were charged to the company on the 12th, though they may have

been actually purchased on the 10th. So that we think it clear that the Circuit Judge was fully justified in assuming that the body was found, at least, as early as the 12th; for it is hardly possible that a suit of clothes in which to array the dead body for burial would have been bought before the body was found.

The case of *Northern Cent. R. R. Company v. State* (29 Md., 420), to which our attention was especially invited by counsel for appellant, differs from the one under consideration in this material respect. There the fact was clearly shown that the company had full knowledge that the deceased had received serious injuries by its train, which proved to be mortal, notwithstanding which he was locked up in a building at the station and left all night without any attention whatever, either medical or otherwise.

So that even if it was possible to assume, which it would be difficult to do upon the very slender testimony presented in this case, that the deceased was not killed by the fall from the train, but only injured, and that he crawled from the spot where he fell to the point where his body was found, and was there frozen to death, and that with timely aid, which it was the duty of the railway company to render, his life might have been saved, still, in the absence of any evidence that the company knew, or ought to have known, that he had been injured, it would be impossible to hold the company liable for not rendering aid not known to be needed.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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STATE v. BRIGGS.

1. The continuance or non-continuance of a cause is a matter of discretion which must of necessity rest with the Circuit Judge.
2. A demand by the prisoner for a copy of the indictment made after the trial had commenced, and more than three days after his arraignment, was properly refused.
3. Under an indictment for murder, the panel having been exhausted without obtaining a single juror, the trial was adjourned over until

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the next week. *Held*, that the prisoners were not entitled to a discharge upon the ground of former jeopardy. *State v. Shirer*, 20 S. C., 393, approved and followed.

4. The panel being exhausted by the challenges of the four prisoners on trial, the deficiency should have been supplied by issuing a venire for additional jurors as prescribed by law. *Gen. Stat.*, § 2255. It was irregular to postpone the trial to another week before another original jury; for a trial once entered upon should not be adjourned over except where extraordinary circumstances so require.
5. The right of challenge is regarded as sacred; and where a prisoner was allowed only twelve challenges, because he had exhausted eight of another jury the week before, the court committed error of law, and the prisoner is entitled to a new jury.

Before ALDRICH, J., Edgefield, August, 1886.

This was a prosecution of Josh Briggs and Elijah Briggs for murder. The opinion fully states the case.

*Mr. Arthur S. Tompkins*, for appellants.

*Mr. Nelson*, solicitor, contra.

June 29, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. The defendants and Joseph White and Hansom Briggs, were arraigned at Edgefield, on Monday, August 2, that being the first day of the term, for the murder of James S. Blackwell. No demand was then made for a copy of the indictment "three days before trial," but upon agreement of counsel and with the consent of the court, Friday (August 6) was set for the trial. When that day arrived the counsel for the defendants moved for a continuance, on the ground of the absence of witnesses, &c., which the judge refused and ordered the trial to proceed. The State challenged one juror peremptorily, and each of the four defendants challenged eight, making thirty-two. This exhausted the panel without a single juror being sworn for the trial of the case. Under these circumstances the presiding judge did not order a new venire "to supply the deficiency," but in his discretion directed the trial of the case to be suspended until the Thursday following. The defendants made no objection, but were silent.

For that second week of the term a separate and distinct jury

had been drawn and summoned, in accordance with the law regulating jury trials for Edgefield County. See section 2255, General Statutes; also section 2637. When the day (August 12) arrived there was a new jury, and the case was called for further progress in the preparation for trial. The solicitor, representing the State, entered a *nolle prosequi* as to two of the defendants, viz., Joseph White and Hansom Briggs. Thereupon objection was made that the solicitor could not *nol pros.* as to two and not as to all the defendants, and also, that the defendants having been regularly arraigned and put upon their trial the week before, all pleaded "former jeopardy," and were entitled to be discharged. These impediments being overruled, the counsel for the defendants demanded a copy of the indictment and "three days' delay," and that being refused, he moved for a new venire, to continue and complete the preparations for a trial which had been commenced the week before; but the defendants were put upon their trial before the new jury summoned regularly for the second week of the term. The court held that each defendant, having challenged eight jurors the week before, was only entitled to challenge twelve more to make the twenty allowed.

Thus the jury was organized which found the defendants "guilty;" and the appeal comes to this court upon the following exceptions:

"I. Because the court erred in refusing to continue the case upon the showing made by the defendants' attorney, it being the first term Josh Briggs has appeared for trial.

"II. Because the court erred in refusing to allow the defendants a copy of the indictment 'three days before the trial.'

"III. Because the court erred in not proceeding forthwith to order empanelled a new set of jurors to supply the deficiency made by exhausting the panel of challenges and other objections; and in allowing the case to begin and then to stop until the next week, trying in the *interim* various other cases, and proceeding to take up the case again the second week before the regular jury empanelled for that week, and at the same time holding the said defendants to their eight challenges each, made to the previous jury the week before, thereby allowing them but twelve challenges to the jury of the second week.

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"IV. Because the court committed error in not sustaining defendants' motion to draw a new set of jurors.

"V. Because the trial of the defendants the second week before the second jury was putting them 'in jeopardy' twice for the same offence, and the court erred in not sustaining the motion in arrest of judgment on that ground; and also on the ground of grave irregularities in drawing the jury and breaches of criminal practice in their method of trial.

"VI. Because of error in allowing a *nolle prosequi* to be entered as to two of the defendants, Joseph White and Hansom Briggs, at the stage of the trial at which it was done, without entering the same as to the other two.

"VII. Because the verdict was contrary to the law.

"VIII. Because the court refused to charge the following requests to charge hereto attached and marked 'exhibit A.' &c."

The first exception was very properly abandoned. The continuance or non-continuance of a cause is a matter of discretion which must of necessity rest with the Circuit Judge.

We are clear that there was no good ground to arrest the judgment and discharge the defendants. There was no error in the refusal of the demand at the time it was made, for a copy of the indictment "three days before trial." No such demand was made at the time of the arraignment on Monday (August 2), when Friday (August 6) was by consent appointed for the trial, nor on that day before the actual commencement of the trial. No injustice was done, as the time between the arraignment and trial was more than that allowed by law. "A demand for a copy of the indictment, &c., should be made at the latest when the prisoner is arraigned in open court." See *State v. Briggs*, 1 *Brev.*, 8; *State v. Winningham & Miller*, 10 *Rich.*, 268.

The fifth exception complains "that the trial of the defendants in the second week before the jury summoned for that week was putting them twice in jeopardy for the same offence, and the court erred in not sustaining the motion in arrest of judgment on that ground, and also on the ground of grave irregularities in drawing the jury, and breaches of criminal practice in their method of trial." The preparation for trial in the first week, when the whole panel was exhausted by challenges without

obtaining a single juror, cannot possibly in any sense be regarded as putting the defendants in "jeopardy." But without stopping now to go into the nice learning in the books upon the subject of the commencement of "jeopardy," it is enough to say that this court lately had occasion to consider the whole subject in the case of *The State v. Shirer* (20 S. C., 393), in which it was held: "1. That the provision in the United States constitution, that 'no person shall be subject for the same offence to be twice put in jeopardy of life or limb,' applies only to offences and trials under the laws of the general government. 2. In a trial for larceny there was a mistrial. At the next term the former indictment was marked *nolle prosequi*, and a new bill found. Held, that defendant was not entitled to his discharge under a plea of *autrefois acquit*. And 3. Under the express terms of the constitution of this State, that 'no person, after having been once acquitted by a jury, shall again for the same offence be put in jeopardy for his life or liberty,' which provision was intended to be exclusive and exhaustive, a party cannot plead a former jeopardy in bar of the prosecution, unless he has been acquitted by a jury." No jury was charged or even empanelled in this case, except the one which in the second week tried and convicted the defendants; and therefore it could not be that, in any proper sense, there was a former jeopardy.

But we think there must be a new trial for lack of conformity to the law and criminal practice in the court below. The third exception complains, "that the court erred in not proceeding forthwith to order empanelled a new set of jurors, to supply the deficiency made by exhausting the panel by challenges and other objections; and in allowing the case to begin and then to stop till the next week—trying in the *interim* various other cases—and proceeding to take up the case again the second week before the regular jury empanelled for that week, and at the same time holding the said defendants to their eight challenges each made to the previous jury the week before, thereby allowing them but twelve challenges to the jury of the second week." In the language of Mr. Bishop, "The law casts its protection over all persons alike. Hence before any person can be made to suffer for a crime, he must be caught and held in the exact meshes which

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the law has provided; or, in other words, he must be proceeded against step by step, according to the rules of practice, which the law has ordained. It is no avail to proceed against him according to other and better rules. The law's rules must be pursued, or the law's penalty cannot be imposed upon him for his crime. \* \* Human laws are meant to secure the outward order of society, and a part of this order, not less essential than any other part, consists in pursuing the exact methods which the law has laid down in bringing criminals to justice." As we understand it, where a party is put to his trial upon a criminal charge, the case must proceed in the manner prescribed by law, until a mistrial or verdict is reached. We know of no authority for suspending it for a time or even to stop short of a verdict, except in extraordinary circumstances, such as the illness of one of the jury, the prisoner, or the court, the absence of a jurymen, or the impossibility of agreeing on a verdict. See *State v. McKee*, 1 *Bail.*, 654, 21 *A. D.*, 499; *State v. Shirer*, *supra*; 1 *Bish. Cr. Proc.*, § 89.

Section 2255 of the General Statutes provides that: "Whenever it shall be necessary to supply any deficiency in the number of grand or petit jurors duly drawn, whether caused by challenge or otherwise, it shall be the duty of the jury commissioner to attend in open court, together with the clerk of the Court of Common Pleas and General Sessions, and the sheriff of the county, and, under the direction of the court, to draw from the special apartment in the jury box known as the tales box, such number of fit and competent persons to serve as jurors as the court may deem necessary to fill such deficiency. \* \* Provided, that if the special or tales box shall at any time be exhausted, the judge of the Circuit Court shall order the board of jury commissioners, or a majority thereof, to attend in court, and in the presence and under the direction of the court, to draw from the other apartments of the jury box such number of jurors as the court may deem necessary." This is a plain, positive direction as to how to proceed in a criminal case, "whenever it shall be necessary to supply any deficiency" as to jurors. After the trial was entered upon in the first week of the term, and the jury was exhausted, we think it was irregular to adjourn it over to the



second, and then to present the jurors regularly drawn for that week, instead of those who would have been presented if the above provision of the law had been followed.

This may seem technical. It may not be obvious that by this course any injustice was done to the defendants. Theoretically the jurors summoned under one venire may be as good as those called under another; but in criminal proceedings, and especially those involving life, it is proper that there should be great care and particularity. The law is tender of the life and liberty of the citizen. The "adjournment" of a trial after it has been opened, is distinguishable from an ordinary continuance. The old idea was that a criminal cause should be finished at one sitting, but men must be refreshed by food, rest, and sleep. The objection, when in strict law it prevails, is that thereby the defendant is deprived of his right to be acquitted or convicted. See *Bish. Cr. Proc.*, § 966d.

But if, the jury of the first being exhausted, the parties could be properly put upon their trial before the jury of the second week, it seems to us that such trial was *de novo*, and it was contrary to the principles and practice of criminal proceedings to consider the two juries as substantially the same, and to hold that the defendants respectively were bound by the eight challenges made in exhausting the panel of the first week, and to allow him only twelve instead of twenty peremptory challenges to the jury having them in charge. The right of challenge as allowed is regarded sacred. "The defendant may require the panel to be full, and to be entirely called over once in his hearing, before entering on his peremptory challenges. Though, if he will, he can waive these rights." 1 *Bish.*, § 944.

From the view the court takes, the case will have to go back for another trial, and it is thought best that the defendants should neither be prejudiced nor benefited by any view which the court may take of the facts. We will therefore not consider the various alleged errors, both of commission and omission, in the charge of the presiding judge.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the prisoners remanded for trial at

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the next term of the Court of General Sessions for the County of Edgefield.

## WILLIFORD v. GADSDEN.

Defendant being sued in a trial justice's court for \$9.20, made a written offer, before answering, to allow judgment to be taken against him for \$5. This offer plaintiff declined. Plaintiff then obtained judgment against defendant for \$7.95, but this judgment was reversed on appeal. At the second trial, plaintiff obtained judgment for \$9.20, but this, too, on appeal was changed by the Circuit Court to a judgment final in plaintiff's favor for \$4.85—which was less than defendant's offer before the first trial. *Held*, that under section 88, ¶ 15, of the Code, the plaintiff was liable for all the costs of the case subsequent to defendant's offer.

Before ALDRICH, J., Fairfield, September, 1886.

The opinion states the case.

*Mr. Osmund W. Buchanan*, for appellant.

*Messrs. McDonald & Douglass*, contra.

July 1, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. The plaintiff sued the defendant before a trial justice upon an account for \$9.20. The defendant, before answering, made to the plaintiff a written offer to allow judgment rendered for \$5. This the plaintiff declined. The trial was had and he recovered judgment for \$7.95. The defendant appealed to the Court of Common Pleas and the judgment was set aside and a new trial ordered. In the next trial, the plaintiff recovered judgment for \$9.20. The defendant again appealed, and Judge Fraser rendered a final judgment for \$1.85, less than was originally offered.

The question made is as to the costs of the case. The clerk of the court decided that the defendant should pay the costs of the first, and that the plaintiff should pay those of the second appeal.

Judge Aldrich confirmed this taxation, and from this order the defendant appeals to this court upon the following grounds: "I. For that his honor erred in confirming the decision of the clerk, and in not giving and allotting all costs to the defendant, which accrued after the offer to allow judgment for an amount greater than that which was recovered in the cause, which offer was not accepted by the plaintiff. II. That his honor erred in allowing to the plaintiff any costs accruing after said offer made by the defendant."

Some confusion as to the costs has arisen, as we conceive, from confounding two provisions of the code, which are entirely distinct and were meant to apply to different classes of cases. Subdivision 15 of section 88 (in regard to rules to be observed in courts of trial justices) provides as follows: "The defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and gives notice thereof in writing, the trial justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer," &c. This case falls precisely under this provision. The defendant "before answer," as required, made the written offer to allow judgment for \$5, which was not accepted; and after long litigation he failed to obtain judgment for a larger amount, the final judgment being \$4.85. The plaintiff staked himself upon being able to recover more than \$5, in which he failed; and it would seem to follow necessarily that he who caused the useless litigation should "not recover costs, but should pay to the defendant his costs arising subsequent to the offer."

But it happened that, during the litigation, there was one or more appeals to the Circuit Court, and it is claimed that this made a different case, to which the provisions of chapter 3 of title 11, part II., of the Code (appeals to the Circuit Court from an

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inferior court) are in some way applicable. Section 373 of the chapter indicated does, among other things, provide as follows: "Costs shall be allowed to the prevailing party in judgments on appeal in all cases, with the following exceptions and limitations: in the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. If he claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount. Within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and trial justice an offer in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may thereupon, and within fifteen days thereafter, file with the trial justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket and correct such judgment accordingly, and the same so corrected shall stand as his judgment and be enforced accordingly; and any execution which has been issued upon the judgment appealed from shall be amended by the trial justice to correspond with the amended judgment. If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment of the court below, or if such offer be made and not accepted, and the judgment in the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs: provided, however, that the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal or be made more favorable to him, to the amount of at least ten dollars," &c.

This provision, properly understood, in no way conflicts with the regulation in section 88 as stated above. It is true that during the litigation there was one or more appeals by the defendant, in all of which he succeeded; but, the intermediate proceedings being set aside, we have to do only with the final judgment—that was "the failure to obtain judgment for a greater amount," &c. When the defendant made the written offer in precise accordance with the regulation in section 88, the force and effect of that notice could not be changed by any number of appeals, whether the notice referred to in section 373 was or was not given on appeal.

That original offer remained unaffected and binding through all the different phases the case assumed until final judgment.

The judgment of this court is, that the judgment of the Circuit Court be so modified as to charge upon the plaintiff all the costs which accrued subsequent to November 24, 1884, when the offer to allow judgment for \$5 was made.

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BLOOM v. SIMMS.

1. Under the act of 1843 (11 *Stat.*, 256) a mortgage not recorded within sixty days was void as to subsequent purchasers for value without notice, and its record after the time allowed by that act could not give it a lien under the act of 1876 (16 *Stat.*, 92; *Gen. Stat.*, § 1776), as this act applies only to instruments of writing executed after January 1, 1877.
2. A mortgage executed December 18, 1865, and recorded March 17, 1866, is void as to a *bona fide* purchaser of the land for value in 1882.

Before PRESSLEY, J., Barnwell, November, 1885.

This was an action by Beda A. Bloom against W. Gilmore Simms, administrator of Joel McLemore, deceased, and John W. McLemore. The opinion states the case.

*Mr. James E. Davis*, for appellant.

*Mr. Laurie T. Izlar*, contra.

July 4, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff, appellant, brought action to foreclose a mortgage executed by Joel McLemore to the appellant December 18, 1865, which was recorded on March 17, 1866. On December 6, 1882, Joel McLemore, since deceased, sold and conveyed the land covered by said mortgage to the defendant, John W. McLemore. The question below was whether the mortgage of the plaintiff not having been recorded within the prescribed time, although it was recorded before the defendant, John W. McLemore, bought the land, was

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void as to said John W. under the act of 1843. His honor, Judge Pressley, who heard the case, ruled that the recording being more than sixty days after its date, it could not affect the rights of John W., unless he had actual notice of the existence of said mortgage before he purchased, or of facts sufficient to put him on inquiry. "And he ordered the case be recommitted to the master to report whether J. W. McLemore had any actual notice of said mortgage, or of any facts sufficient to put him on inquiry."

The plaintiff appealed upon the grounds: First. That as the mortgage was duly recorded at the time the conveyance was made to the defendant, J. W. McLemore, he received the land subject to the incumbrance of the mortgage, and the order of his honor holding otherwise was erroneous. Second. That the defendant, J. W. McLemore, not having purchased the land until after the act of 1843 had been amended, the said record of said mortgage was notice to all the world after the passage of said amendment. Third. Because the court erred in ruling that the recording of the said mortgage "was not notice under the act of 1843, whereas his honor should have held that, even admitting such to be the case, it was notice at the date of defendant's purchase under the law at that time and now, and the ruling of the master on that point should have been sustained."

There can be no doubt that but for the act of 1876, amending the act of 1843, so as to allow mortgages to be recorded after the sixty days, and declaring that they should take effect from the date of the record, the question here could hardly have been raised, as the act of 1843 expressly declared that such papers not recorded within the prescribed time were absolutely void as to subsequent purchasers and creditors without notice. The question, then, to be considered is, did the act of 1876 legalize the record of this mortgage and give it lien from the date of said record as to purchasers subsequent to that date. It must be remembered that the mortgage was recorded before the passage of the act of 1876. It was recorded in 1866, ten years before the act of 1876. At the time of this recording, therefore, the mortgagee had no legal right to have it recorded. This right had been lost by his delay, and the recording had no effect what-

ever, so far as subsequent purchasers and creditors were involved. True, it might possibly have been the means of giving actual notice of its existence to such persons as may have seen the record, if any, but it could not operate as constructive notice to such as had not seen said record, as it would have done had it been recorded within the prescribed time under the act of 1843.

Suppose the mortgagee had held the mortgage unrecorded until the passage of the act of 1876, and had then recorded it, would it have taken precedence of the purchase by the defendant, J. W. McLemore, in 1882? We think not, for the reason that the act of 1876 restricts its operation in terms to deeds, &c., executed and delivered after the first day of January, 1877. There is certainly no express retrospective influence given to that act, and in the face of an express limitation to such papers as may be executed and delivered after the 1st day of January, 1877, the court would be wholly unwarranted to give it an implied retroactive operation, affecting mortgages executed long before that date. *McNamee v. Huckabee*, 20 S. C., 199. Much less in our opinion could it be construed to legalize a record made before its passage, as this was. The necessity to have these papers recorded is statutory, as well as the effect of such recording, and the statute must be complied with, or the record will be wholly unavailing.

The case of *King v. Fraser* (23 S. C., 548), has no application here. That was decided after the act of 1876, and adjudicated the effect of recording a paper belonging to the class provided for in said act. We think the Circuit Judge was not in error in his ruling.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

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McKNIGHT v. COOPER.

1. The court, in its discretion, may permit an amendment to a pleading, provided such amendment does not entirely change the nature of the action or defence.

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2. In action for the recovery of land, the defendant claimed the value of improvements erected by him thereon, alleging that he entered into possession under a purchase believed by him at the time to be in fee. After an oral demurrer to this claim, defendant was permitted by the Circuit Judge to amend his answer and allege that at the time both of purchase and of erecting the improvements he believed his title to be good in fee. *Held*, that the claim was for the value of improvements, and the amendment only alleged an additional fact in support of the same claim; and therefore the amendment was legitimate.

Before WITHERSPOON, J., Williamsburg, February, 1887.

The opinion fully states the case.

*Mr. H. J. Haynsworth*, for appellants.

*Messrs. T. M. Gilland and M. J. Hirsch*, contra.

July 4, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The action below was to recover a certain tract of land situate in Williamsburg County from the defendant, respondent. The respondent's answer averred title in himself, and, further, in the event that this defence failed, that he entered into possession under a purchase from one Newsome, believing at that time that he had a good title in fee, and that he had made improvements thereon of the value of \$1,500. And he demanded, first, that the complaint be dismissed; second, failing in this, he claimed compensation for his improvements. At the trial it was admitted that the plaintiffs had the title, and the case proceeded on the question of improvements, the respondent being the actor thereon. At the close of defendant's testimony upon this matter, the appellants put up no witnesses, but interposed an oral demurrer to so much of respondent's answer as claimed compensation for his improvements, the demurrer being based upon the fact that the respondent had alleged no more in his answer than that "he believed he had a good title in fee *at the time of his purchase*; whereas, to entitle the respondent to recover he should have averred a belief of good title *at the time the improvements were made*, which averment not having been made, the facts alleged constituted no defence."



Upon an intimation from the judge that he would sustain the demurrer, the respondent moved to amend his answer, and leave being granted, the respondent substituted the following in place of the former answer, to wit: "That the defendant purchased the tract of land some time in 1871, and at that time went into possession, and since then had made valuable improvements on said premises, erecting buildings and clearing lands of the value of \$1,500, he believing at the time of said purchase, and at the time of making such improvements, that his title to said premises was good in fee." The appellants having declined to ask for a continuance, the trial then proceeded, which resulted in a verdict for the respondent for \$500, the amount that the land had been increased in value, after deducting \$300 for damages to the plaintiffs.

The appeal is based upon the following exceptions: 1. Because the said amendment changed substantially the claim or defence set forth in the defendant's answer. 2. Because it was error to allow the said amendment after the close of the testimony, and after the defendant had failed to prove that he had a good title in fee *at the time he made the improvements*.

As is stated in the argument of appellant's counsel, the right to improvements in cases like that before the court is a statutory right, and there are two acts upon the subject: 1st. General Statutes, sections 1835-1841, amended by act of 1885, p. 432; and, 2d. Act of 1885, p. 343. The first act provides for the recovery by the improving tenant, of the value of such improvements as he, or those under whom he claims, may have erected, upon the condition, however, that he believed *at the time of his purchase* of the premises, that he had obtained a good title; the second provides for such recovery, where he has erected the improvements himself, believing *at the time of such erection* that his title was good—the difference between them being, that under the first act improvements made by the party under whom the defendant claims, as well as those made by himself, may be recovered, provided, however, that he believed when he purchased the land that he was getting a good title, while under the second act he can recover only for such improvements as were made by himself, and when at the time they were made he believed his title was perfect.

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The claim here seems to have been made under the first act, as the averment in the answer stated that respondent made the improvements under the belief that at the time of his purchase his title was good in fee. It is stated in the "Case" that the respondent failed to prove this averment, and at that stage of the trial the demurrer was interposed, to avoid which, after an intimation from his honor, the motion to amend was made. There has been no appeal from the order sustaining the demurrer, for the reason, perhaps, that no such order was actually entered—it was only intimated—and the respondent thought it safest to remedy his answer by the motion to amend, which was granted.

The code provides: "That the court may, before or after judgment in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or a mistake in any other respect, or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defence by conforming the pleading or proceeding to the facts proved." This section of the code is the authority for amendments under the present practice, and it is very broad and wide, conferring in furtherance of justice considerable power upon this subject upon the courts. Indeed, it would seem at first that this power was almost unlimited, except that it is subject to the exercise of a mere discretion, and in some of the States, perhaps, unappealable. We have not, however, in this State gone that far. But we have said that much should be left to his discretion in such matters. While saying this, however, we have further held that this discretion is bounded at least by one limitation, to wit. that the amendment should not entirely change the nature or cause of action or defence. *Trumbo v. Finley*, 18 S. C., 305; *Whaley v. Stevens*, 21 Id., 221.

The question here, then, is, did the amendment complained of violate this rule? Did it change the character of defendant's position? Did it allow him to present a new and altogether different claim from the one presented in his original answer? The respondent, although he appeared upon the record below as a defendant, yet in the claims which he made for the value of his improvements he was really occupying the position of a plaintiff.

He admitted the plaintiffs' title to the land in dispute, and set up in his answer his right to said improvements. His answer may be regarded, therefore, as a statement of his cause of action against the plaintiffs, which generally he would have been compelled to assert by summons and complaint, but under the act in reference to improvements he was allowed to assert as he did. Looking at the answer, then, as a complaint, what was the cause of action upon which he relied? It was a demand for the value of certain improvements which he had placed upon the premises of the plaintiffs, and which we must suppose the plaintiffs had refused to pay.

Now, has the amendment allowed by the Circuit Court changed this cause of action, and authorized the allegation of a new and altogether different cause? Or has it done no more than permit new allegations in support of the original cause? If it has done the former, then the Circuit Judge went beyond the authorities. If, however, nothing more than the latter was allowed, then the amendment was entirely legitimate. It will be observed that the code in terms authorizes the insertion of allegations material to the case, either before or after judgment. The case here, as we have said, was for the value of the improvements, but it was defective: not, however, in the claim or case, but in the allegations material to said case, and the amendment seems to have allowed respondent to remedy this defect. The defendant still claims his improvements, and he claims nothing more than he did at first. His original cause of action, as we have said, was founded upon his alleged right to compensation and the refusal of the plaintiffs to pay for improvements. This is still his cause of action, and by his amendment he only inserts an additional material fact, why his claim is well founded, and in support thereof.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

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## WAGENER &amp; CO. v. MARS.

1. Where exceptions to the admission of evidence are noted on the master's minutes, but are not renewed in the exceptions filed to his report, nor considered in the Circuit decree, the judge's failure to sustain them cannot properly be made a ground of appeal to this court.
2. In action to cancel deeds for fraud, evidence may be received in behalf of plaintiffs as to other deeds of defendants—as to their tax returns—as to other lands owned by them—as to assignments by them of agricultural liens and other papers—and as to their purchases of property.
3. A party may introduce testimony to show a state of facts different from that testified to by one of his witnesses.
4. Findings of fact deliberately made by the master and unqualifiedly concurred in by the Circuit Judge will not be overruled unless error in such findings is patent and overwhelming.
5. Deeds executed without a valuable consideration, and for the purpose of defeating, delaying, and hindering creditors of the grantor, is void as to them.
6. A Court of Equity, upon vacating a deed for fraud, may decree that the land shall be sold and the proceeds applied to the debts of the grantor.
7. In action by judgment creditors in behalf of themselves and other creditors to cancel a deed for fraud, the attorneys for plaintiffs are entitled to a fee out of the fund realized to the creditors, for services successfully rendered, but not so as to diminish the balance going to the defendants after the creditors are satisfied.

Before HUDSON, J., Abbeville, October, 1886.

This was an action by F. W. Wagener & Co., judgment creditors of W. W. Mars, against said W. W. Mars, T. W. Mars, and Lucy J. Mars, to vacate certain deeds for fraud. The case was referred to J. C. Klugh, Esq., master, who reported as follows:

It was referred to me in this case to take testimony and report upon all questions of law and fact submitted. The action is brought to set aside two conveyances, the one from W. W. Mars to T. W. Mars, and the other from T. W. Mars, of the same property, to Lucy J. Mars, who is the wife of W. W. Mars; and to subject said property to the payment of the debts of W. W. Mars. The first of these conveyances, that from W. W. to T. W. Mars, was made on Sept. 24, 1881. The property conveyed was

one-half interest in 900 acres of land known as the homestead, a tract of 75 acres, known as the Bellott tract, and one-fourth interest in 160 acres, known as the Covin tract; the alleged consideration was \$2,500. At the time this conveyance was made W. W. Mars and T. W. Mars were jointly indebted to the plaintiffs on a note for \$3,000, dated February 9, 1880, and due Dec. 1, 1880, and W. W. Mars was also heavily indebted to various other parties, many of whom had already brought suit on their demands, and got judgments against him at the October term of the court following. Said W. W. Mars had for several years been in business as a merchant in a country store. The above mentioned conveyance left him without a dollar of property, real or personal, so far as appears from his sworn returns to the county auditor.

The question presented is, was this conveyance made with the intent to defeat, delay, and hinder the creditors of W. W. Mars? I think there can be scarcely a doubt that it was. Almost all the more prominent badges of fraud are apparent to the slightest investigation of the circumstances attending it. The grantor was heavily in debt; his creditors were pressing him hard; the plaintiffs, Wagener & Co., themselves brought suit against him in four days after he made the transfer of his property, showing that they must have been urgent for payment of their debt even before. The property conveyed embraced his entire estate, his store having been burned several months previously. The alleged consideration, \$2,500, can scarcely be called an adequate price for the property. There were nearly 600 acres of land lying on Little River, on the Savannah side of the county, and probably worth at least twice as much as the price named.

Besides, I think it extremely doubtful whether any consideration whatsoever was paid. The plaintiffs have produced such testimony as it was possible in the nature of the case for them to produce, to show that the consideration was nominal. They have shown that no money was passed when the deed was executed. The defendants have had every opportunity, as they must be considered to have every reason and inducement, to show that the price paid was *bona fide*. They could have shown it by their own oaths as plaintiffs' witnesses without fear of contradiction,

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yet they have been as silent as the grave on this point. I regard this as a strong circumstance in support of this allegation of the complaint. Even if the consideration could be held to be real and sufficient, the transaction must still be held void, for T. W. Mars knew perfectly well W. W. Mars's condition financially, and that he was stripping himself of every vestige of property available for his creditors. And the sequel shows that it was a cunning device of these two men, and that T. W. Mars kept the faith that was reposed in him; for in less than a year this very property found its way into the hands of W. W. Mars's wife by a transaction strikingly like the former one.

We come now to the conveyance from T. W. Mars to Mrs. Lucy J. Mars. It is dated Sept. 4, 1882, and conveys the same lands, described in the very same terms, and for the same consideration as that named in the deed from W. W. to T. W. Mars. Mrs. Mars sets up the defence that she is a *bona fide* purchaser for value without notice or knowledge of fraud or intent to hinder, delay, defeat, or defraud the creditors of W. W. Mars. I do not see how her defence can be sustained. She offers no testimony in support of it save what may be gathered from her own statements while testifying as a witness for plaintiffs. As to the consideration, her statement is that she paid \$2,500; that she borrowed the money from her mother; that she did not tell her mother what she wanted with \$2,500, but that it was borrowed to pay for this land. It does not appear that she gave any security for the loan. Mrs. Mars's testimony is so indefinite, her recollections are so vague, and her memory confessedly so unreliable as to dates, amounts, quantities, etc., that I confess I receive this story about the loan with great reserve. It seems to me at variance with our common experience amongst people of limited means, that a young wife who has near \$5,000 in cash at her marriage, should borrow, in less than two years after her marriage, \$2,500 from her parent, and make no explanation of her disposition of her own fortune, nor even tell what the loan was to be used for, and give no security for the money.

After weighing all the circumstances and the testimony carefully, I am strongly inclined to believe that Mrs. Mars is mistaken as to the time or the amount which she obtained, or both.

Immediately after her marriage Mrs. Mars began an extensive and varied course of dealing with both of her co defendants. It is reasonable to suppose that in her intimate associations and relations with them she learned much of their methods of dealing, their plans, intentions, purposes, and of the results aimed at or achieved by them. A person of half the intelligence and shrewdness which she has exhibited in the progress of this case, would have done so. Yet she claims to have known nothing of their business, of their indebtedness, or of the suits against them. She is especially and profoundly ignorant of her husband's affairs. She does not even know what property he ever owned, nor that she bought from T. W. Mars the very land which W. W. Mars had owned less than a year before. She only knows that her husband is now entirely divested of any estate of any kind.

Such ignorance would be lamentable if it was not directly contradicted by the facts; for, in the first place, she produces in evidence a deed from T. W. Mars to herself, dated February 4, 1881, conveying to her a half interest in the home place of 900 acres, and reciting that W. W. Mars owned the other half. This last half was the one conveyed to her by T. W. Mars in the deed of September 4, 1882, it having previously been conveyed to him in the deed of September 24, 1881, by W. W. Mars, so that she and her husband were co-tenants of the home place in 1881, yet she cultivated her half of it and did not know he cultivated the other half, nor who owned it. Again, the deed of W. W. to T. W. Mars, dated September 24, 1881, must have gone into her possession as part of her chain of title, or even if it did not, it was on record and she presumably, as a prudent person, satisfied herself as to the extent of T. W. Mars's interest and power to convey. She admits that at some indefinite period she knew T. W. Mars was indebted and was being sued. This may have been in 1882 as well as any other time, so far as appears from her testimony.

The impression made upon my mind from Mrs. Mars's testimony is that she was extremely cautious in her disclosures and unwilling to say anything that might betray her co-defendants or commit herself in any way to a knowledge of their designs. I am satisfied from the evidence that she did know enough of their

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intentions to make her a party to them. Even if she had not actual knowledge, which I hold that she must have had and did have, the circumstances were sufficient to put any person of the smallest degree of prudence and judgment on the inquiry which would have led to an easy detection of the whole scheme.

I find as matters of fact: 1. That the conveyance by W. W. Mars to T. W. Mars of 24th September, 1881, was without a valuable consideration. 2. That said conveyance was made with a fraudulent intent in both parties to defeat, delay, and hinder the creditors of W. W. Mars. 3. That the conveyance by T. W. Mars to Lucy J. Mars was without a valuable consideration. 4. That said conveyance was made with the intent on the part of both parties to further defeat, delay, and hinder the creditors of W. W. Mars.

As conclusions of law: 1. That the conveyance by W. W. Mars of 24th September, 1881, was void. 2. That the conveyance by T. W. Mars to Lucy J. Mars of 4th September, 1882, was void. 3. That plaintiffs are entitled to judgment as prayed for in their complaint.

The Circuit decree was as follows:

This cause came on to be heard on the exceptions to the master's report by the defendants. After hearing the pleadings, testimony, and report of the master, and the argument of counsel, and after a careful consideration of the testimony, I am satisfied that the master has arrived at a correct conclusion on the facts and the law, and that all the circumstances connected with the conveyances assailed, as ascertained from the testimony, clearly indicated the purpose of the defendants to defeat and hinder the creditors of the defendant, W. W. Mars, in the collection of their debts—and I concur with the master in his findings of law and fact.

It is therefore ordered, adjudged, and decreed, that the report of the master be confirmed and the exceptions of the defendants overruled.

It is further ordered and decreed, that the conveyances of the real estate described in the pleadings from W. W. Mars to T. W. Mars and from T. W. Mars, of the same lands, to Lucy J. Mars, wife of the said W. W. Mars, be declared fraudulent and void as to the creditors of said W. W. Mars, and that the said convey-



ances be delivered up by the defendants, or either one of them having possession thereof, to the master of this court, to be by him cancelled; and that the said several tracts of land, described in the pleadings and in said conveyances referred to, be sold by the master of this court; \* \* \* that from the proceeds of sale, after payment of the costs and expenses of sale and any taxes or assessments thereon, the master do pay to the parties entitled respectively the costs of this proceeding to be taxed by the clerk of this court, and hold the net proceeds of sale subject to the further order of this court; and that the master of this court do ascertain and report the encumbrances by judgment and execution against the said W. W. Mars, and report the amounts due thereon, with their respective priorities, and that he give notice by publication for two weeks in one or more newspapers of the county for creditors claiming to hold such liens to present and prove the same before him on a certain day to be named.

It is further ordered and decreed, that it be referred to the master of this court to take testimony and report a suitable fee to be paid to the attorneys of the plaintiffs in this suit out of the fund coming into his hands from the proceeds of the sale of the lands made under this decree.

The defendants appealed upon the following exceptions, but the first six subdivisions of exception I. were not embraced in the list of exceptions taken to the master's report.

I. Because it was error in his honor to overrule the exceptions of the defendants to the rulings and report of the master in said case, which exceptions charged that the said master erred in the following particulars: 1. In admitting evidence as to any other deeds but the ones mentioned in the complaint. 2. In admitting evidence as to the tax returns of defendants. 3. In admitting parol testimony as to the lands owned by defendants, the deeds or other instruments under which they held them being the best evidence as to their interest and the number of acres. 4. In admitting testimony as to the assignment to plaintiffs by defendant, W. W. Mars, of agricultural liens and other papers. 5. In admitting testimony as to the purchase of a note from W. W. Mars by Mrs. Lucy J. Mars. 6. In admitting testimony offered by plaintiffs as to returns of Mrs. R. A. Moore, as guardian, to

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impeach the testimony of their own witness, Mrs. Lucy J. Mars.<sup>1</sup>  
[The other subdivisions raise questions of fact.]

II. Because it was error in his honor as matter of law not only to disregard the testimony of plaintiffs' witnesses, but to draw from that testimony a conclusion directly opposite to that which they swore to.

III. Because it was error in his honor to order the land to be sold by the master, his power being exhausted by adjudging the deeds fraudulent, and ordering the defendants to deliver them up to be cancelled.

IV. Because it was error in his honor to order the master to take testimony as to a suitable fee to be paid to plaintiffs' attorneys, and to direct that such fee be paid out of the proceeds of sale of the land.

V. Because his honor could not lawfully do more than to place the parties in the position they would have occupied if no deed had been made, and to leave the plaintiffs to their remedies at law.

VI. Because the plaintiffs had full power and authority to enforce their execution, and it was error in his honor to attempt to give them higher rights than they have under their judgment.

VII. The defendant, Lucy J. Mars, further appeals on the following grounds: 1. Because his honor erred in holding that she has no higher right in the matter than her vendor, and that if he acquired his deed by fraud, she cannot get a better title than he had, even if she was a purchaser for valuable consideration, and without any notice of the fraudulent character of his deed. 2. Because the evidence offered by plaintiffs shows that this defendant is a purchaser for value and without notice, and she submits that her title is good, even if T. W. Mars acquired his by fraud.

VIII. Because said judgment is contrary to law and the evidence.

*Messrs. Graydon & Graydon*, for appellants.

*Messrs. Parker & McGowan*, contra.

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<sup>1</sup> Plaintiffs disclaimed any intention of impeaching Mrs. Mars's testimony, and the returns were received by the master only as tending to show a state of facts different from that testified to by Mrs. Mars.—REPORTER.

July 4, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The action below was brought by the plaintiffs, judgment creditors of the defendant, Walter W. Mars, to set aside two deeds, one from the said Walter W. Mars to Thomas W. Mars conveying certain lands, and the other from Thomas W. Mars to the defendant, Lucy J. Mars, the wife of the said Walter, conveying the same lands. The first deed is dated September 24, 1881, and the second September 4, 1882, and the ground of attack was that they were executed without consideration, and for the purpose of defeating, delaying, and hindering the creditors of the said W. W. Mars, and were collusive and fraudulent and that the said W. W. Mars had no other visible property within reach of his creditors.

The master sustained the allegations of the complaint, finding as matters of fact, that the conveyance from W. W. Mars to Thomas W. Mars, was without a valuable consideration, and was made with a fraudulent intent in both parties to defeat, delay, and hinder creditors, and also the same as to the second deed from Thomas W. to Lucy J., and he adjudged said deeds void. His honor, Judge Hudson, heard this report upon numerous exceptions, all of which he overruled, and confirmed the report, decreeing that the deeds be delivered up and cancelled, and that the lands be sold. He further ordered that it be referred to the master to report a suitable fee to be paid to the plaintiffs' attorneys out of the proceeds of the sale, &c., &c.

Among the exceptions upon appeal here are several alleging error to the Circuit Judge in sustaining the master in allowing certain incompetent testimony as alleged to be introduced before him. See subdivisions from 1 to 6, inclusive, under the 1st general exception. It does appear in the report of the master that the defendants objected to this testimony when offered, but no exception was carried up to the Circuit Judge on that account; nor does it appear in the decree that his honor made any special ruling thereon. He overruled the exceptions filed and confirmed the report. Under these circumstances we cannot regard the exceptions referred to as before us. Not having been relied upon in the exceptions to the master's report, and therefore no ruling demanded thereon from the Circuit Judge, they must be consid-

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ered as abandoned. But even if they were properly before us, we are satisfied, from the examination which we have necessarily given to the report and decree, that they are untenable.

The important and vital questions in the appeal are questions of fact, to wit, whether these deeds were without consideration, and were executed, as alleged, for the purpose of defeating, delaying, and hindering the creditors of W. W. Mars, the defendants all colluding and conspiring to that end. If these facts are affirmed, as found both by the master and the Circuit Judge, the legal conclusion of invalidity follows beyond doubt. Now, it should be a very clear case, indeed, for this court to overrule the findings of fact below, first reported by the master, and then unqualifiedly concurred in and sustained by the Circuit Judge. With an intelligent and competent master, as the one here seems to be, accustomed and experienced in sifting testimony, with the witnesses before him, and with full time to deliberate and consider, and naturally disinclined, doubtless, to disregard the evidence of his neighbors and fellow-citizens, if it could be avoided consistently with his duty, his findings of fact of the character here especially, come with great force before the court, and when they have been concurred in by the Circuit Judge, they ought not and cannot be overruled, unless the error is patent and overwhelming. It is needless to go over the testimony; sufficient to say, that we have examined it thoroughly, and we do not feel warranted in saying that we find such an error as that suggested here. The findings of fact, therefore, are affirmed.

The deeds in question, then, having been executed without a valuable consideration, and for the purpose of defeating, delaying, and hindering the creditors of W. W. Mars, which was concurred in by all of the defendants, the plaintiffs being judgment creditors of the said W. W. Mars, and there being no other visible property out of which they can make their debt, it follows, as said above, that said deeds must be delivered up and cancelled as void.

The two remaining questions are, first, did his honor err in directing a sale of the lands after declaring the deeds void? and 2nd, was his order as to the fee for appellants' counsel erroneous?

On the principle that where the Court of Equity has rightfully

assumed jurisdiction of a cause, &c., it may proceed to do full and complete justice by directing a sale of the property, the practice has prevailed in this State as well as elsewhere in cases like this (creditors' bill to set aside fraudulent conveyances of land), to complete the matter by ordering a sale in the event of vacating the deeds. See *Gracey v. Davis*, 3 *Strob. Eq.*, 57, 51 *A. D.*, 663; *McMeekin v. Edmonds*, 1 *Hill Ch.*, 293, 26 *A. D.*, 203; *Fuller v. Anderson*, *McMull. Eq.*, 33, 36 *A. D.*, 290; *Godbold v. Lambert*, 8 *Rich. Eq.*, 264, 70 *A. D.*, 192; *Chataqua County Bank v. White* (6 *N. Y.*, 236), 2 *Selden*, 253, 57 *A. D.*, 442; *Bump Fraud. Con.*, 534. In the face of this unquestioned practice, we cannot say that his honor erred in this particular.

As to the fee. This is a creditors' bill, or in its nature, and the proceeds of the sale are directed by the decree to be held subject to the further order of the court, the master in the meantime to report encumbrances and liens, &c. We think, in so far as the proceeds may be applied to the creditors who may come in and share the result of the plaintiffs' action, a fee for respondents' counsel may be paid therefrom. But should the lands sell for more than enough to pay said claims, the balance, which would belong to the defendants, should not be diminished by any portion of said fee. In other words, the fee should be deducted from the amount of proceeds applied to the creditors' claims. It may be that there was no doubt below, that it would take the entire proceeds of the prospective sale to meet the demands, and therefore the order made was not objectionable. With that understanding, this portion of the decree is affirmed also. But should it turn out otherwise, then this portion of the decree should be enforced as above suggested.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed, as above indicated.

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## TARVER v. GARLINGTON.

While it may be that parol testimony is generally inadmissible to show that defendant was the principal to an unsealed note signed by another as agent, and in which the name of the principal is not disclosed, yet a complaint on such a note, setting it out in full, and alleging that it was signed by the writer as agent for the defendant, cannot be held on demurrer not to state facts sufficient to constitute a cause of action.

Before ALDRICH, J., Laurens, February, 1887.

The opinion states the case.

*Mr. N. B. Dial*, for appellant.

*Mr. John W. Ferguson*, contra.

July 4, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The action below was commenced for the recovery of a certain sum of money alleged to be due the plaintiff from defendants. The complaint was, in substance, as follows, to wit: That the defendants, through their agent, S. D. Garlington, made their note in writing, whereby they promised to pay the plaintiff, or order, four hundred and sixty dollars on the 1st day of November, 1884, with interest at 7 per cent., a copy of which note was attached to the complaint; and after the usual allegations of ownership and non-payment, judgment was demanded for said amount. The copy note attached was as follows:

"\$460. On the 1st day of November next I promise to pay Samuel J. Tarver, or order, four hundred and sixty dollars for value received, with interest from date at the rate of seven per cent. per annum. Witness my hand and seal this March 22, 1884.

"(Signed) S. D. GARLINGTON, Agent."

The defendant, George F. Young, put in an answer denying that Garlington was his agent, and denied the alleged indebtedness; the time for Mary Garlington had not expired, and she had

not answered at the ensuing court. When the case was called and the complaint and answer of George F. Young read, he interposed an oral demurrer, that the complaint did not state facts sufficient to constitute a cause of action, which his honor, Judge Aldrich, sustained, dismissing the complaint with costs as to the defendant, George F. Young, with leave, however, to the plaintiff to amend his complaint. From this order this appeal is before us.

The ground upon which the demurrer was interposed, and upon which, as we suppose, it was sustained, was that a party could not be bound as principal upon a note where it was signed by another simply as "agent," as this note was signed; that under the law applicable to such cases involving the doctrine of agency, before one could be held liable as principal upon a note or other contract, his name should appear in some form upon the face of the paper, so that from the paper itself the principal could be ascertained; and that in the absence of such fact, parol testimony was incompetent to discover or develop it. And the defendant contends here that inasmuch as the note sued on, as shown by the copy attached, was signed by S. D. Garlington, "agent," without specifying for whom he was agent, either in the body of the note or attached to the signature, and inasmuch as parol testimony would not be allowed to explain away or remove this difficulty, therefore the facts stated in the complaint fail to show a cause of action.

The principle relied on by respondent is no doubt correct. In fact, at one time in this State this doctrine was carried much further than that contended for here. See the case of *Fash v. Ross* (2 *Hill*, 294), where it was held that the agent signing his name for another, although the name of the other was mentioned, thus A. B. for C. D., was not sufficient. This case was, however, overruled with the cases that had followed it by the case of *Robertson v. Pope* (1 *Rich.*, 503; 44 *A. D.*, 267); and now the doctrine as to unsealed contracts, negotiable notes, &c., is as stated by the respondent, to wit: that the name of the principal must appear on the paper, so that from the paper itself the principal can be known. This is the general rule, and it is said by some that to this rule there is no exception. In a note to *Parsons on Notes & Bills*, page 92, however, it is stated that

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there is at least one exception apparent, if not real, to wit: where the principal carries on business in the name of the agent. In that case the name of the agent is the name of the principal, *pro hac vice*. *Bank of Rochester v. Monteath* (1 Denio, 402; 43 A. D., 681). In the case of *Hix v. Hinde* (9 Barb., 528), where one had drawn a draft in his own name, styling himself simply "agent," without more, it being known at the time by all of the parties for whom he was acting as agent, it was held sufficient to charge his principal. It is true, however, that in that case a distinction was drawn between a draft and an ordinary note or contract.

The principal upon which it has been held, that where the name of the principal appears anywhere on the note, the agent himself is relieved from liability, and liability attaches to said principal, is, that the principal is known at the time of the contract, and the contract is really made with him. It was upon this principle that *Fash v. Ross*, *supra*, was overruled by *Robertson v. Pope*, *supra*, thus differentiating ordinary unsealed contracts from the technical rule governing sealed contracts in this respect. And in the case of *Robertson v. Pope*, *supra*, Judge O'Neill said the proof was abundant that Byers (the party who signed the note thus, "for Nath'l Pope, Sam'l Byers"), "was the agent of Byers and that Pope received half of the cattle bought for Neuffer and him." Neuffer was the other maker of the note sued on. And it seems that parol testimony was received in that case to show that Pope was a principal in the note.

Now, in the case before us, the question how far parol testimony may be allowed to come in, to explain and to fix the application of the term "agent," as used here, has not been adjudicated by the court below; at least, there does not appear any distinct and positive ruling on this question by his honor. He simply and in short form sustains the demurrer. This question, then, not being strictly before us, we pass it by. The case comes up on demurrer to a complaint, in which plaintiff alleges that the defendants, through their agent, on a note signed by said agent in his own name, "agent," promised to pay him \$160. Under the rules of law and evidence, it may be that the plaintiff would not be allowed to go beyond the face of the note and prove



by parol that S. D. Garlington, in signing this note, promised for and as agent of the defendants, as alleged in the complaint, and if the case had gone to the jury, it may be that such parol evidence being excluded the plaintiff would have failed in his action. But here the defendant admits the truth of the allegations, to wit: that S. D. Garlington had promised for him, and as his agent, to pay said money. He admits the agency, admits the promise, and that it was made by the note, a copy of which is attached. In other words, so far as the demurrer is concerned, he waives his right, if he has any, to exclude parol testimony on the question of the agency, and admits it. Upon these facts admitted, the question of law is raised for the judge; whereas, if the case was before the jury, the first question would be, has the agency been established? Upon the face of the paper unexplained by parol testimony, the jury would be compelled, under the cases above, to answer in the negative. But before the judge, with the agency not even disputed, but actually admitted, it seems to us, it was error to hold that there was no cause of action.

It appears that there is at least one exception to the general rule above stated—note to Parsons, *supra*, page 95—*non constat*, but the plaintiff may be able to bring his case under that exception. Besides, the plaintiff should have the right to test the question, how far parol testimony may be admitted in a case of this kind.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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HARDIN v. TRIMMIER.

1. Defendant lent plaintiff \$900, charging therefor a usurious rate of interest, and afterwards the usury law was so amended that any person who received as interest more than the amount allowed by law was liable to forfeit double the sum so received, to be recovered by a separate action. After the enactment of this law, plaintiff paid the debt in full, according to the letter of his contract, and then brought action

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against defendant to recover double the amount so paid in excess of the sum borrowed. *Held*, that he was entitled to recover. *Statutes stated and cases reviewed.*

2. The penalty for *charging* usurious interest is, under the act of 1877 (16 *Stat.*, 325), a loss of the right to recover interest or costs; and the penalty for *receiving* usurious interest is, under the act of 1882 (18 *Stat.*, 35), a liability to pay double the amount so received. These penalties are different and distinct.
3. In applying the penalty for receiving, after the act of 1882 prescribing such penalty, usurious interest on a usurious contract entered into prior to that act, the act is not made to impair the obligation of the contract, nor given a retroactive effect.
4. Under a statute forbidding the recovery on a usurious contract of any more than the principal debt, only the repayment of the principal debt is the legal contract of the parties. As to the interest charged or reserved, the contract is void.
5. Voluntary payment of usurious interest does not estop the debtor from suing to recover the penalty prescribed in the act of 1882; for it is only by payment that he acquires a right of action under this statute.
6. An amendment to a statute has effect from the time it becomes a law, leaving the prior law still of force as to contracts entered into before the amendment was adopted.
7. Imposing upon a creditor a liability to pay to the debtor double the amount of usurious interest received by the creditor, to be recovered by the debtor in a separate action, or allowed to him as a counterclaim, does not affect the liability of the debtor to pay the amount of his lawful contract—the sum actually lent—and therefore does not impair the obligation of the only contract between the parties recognized by the law.

Before HUDSON, J., Spartanburg, October, 1886.

The opinion fully states the case.

*Mr. J. S. R. Thomson*, for appellant.

*Messrs. Cartlisle & Hydrick*, contra.

July 8, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. On December 18, 1882, Trimmier, the respondent, loaned to Hardin, the appellant, the sum of nine hundred dollars, at the same time taking his note for one thousand and seventeen dollars, payable one year after date, with interest from

date at the rate of seven per cent. per annum. On February 27, 1884, the appellant paid to the respondent the sum of eleven hundred and two 77-100 dollars, being the whole amount due, according to the terms of the note, and being two hundred and two 77-100 dollars in excess of the amount actually loaned by the respondent to the appellant. This action was brought by appellant to recover from respondent the sum of four hundred and five 54-100 dollars, being double the sum received by respondent, in excess of the sum actually loaned by him to appellant, under the provisions of the second section of the act of December 21, 1882. (18 *Stat.*, 35.) These facts having been put in evidence by the plaintiff, who then closed his case, a motion for a non-suit was made by defendant, upon the ground that the penalty or forfeiture imposed by the act of 1882, could not be applied to a payment made on a contract entered into before the passage of the act; and the motion was granted by the Circuit Judge upon that ground.

The plaintiff appealed upon the following grounds, that his honor erred: "I. In ruling that the act in force when the note was given did not give the forfeiture and penalty sued upon in the complaint for a payment in February, 1884, and that any subsequent act could not give a forfeiture for a payment made upon said note. II. In granting a non-suit."

For a proper understanding of the question raised by this appeal, a brief review of the various usury laws of the State may not be unimportant. By the original act of 1777, the taking of more than seven per cent. interest on money loaned was prohibited, and the act declared that any contract for the payment of a greater rate should be absolutely void, and the lender was liable to forfeit treble the value of the money lent, one-half of which should be paid to the commissioners of the treasury and the other half to the informer. By the act of 1830 the provision of the act of 1777 declaring the whole contract by which money loaned at a greater rate of interest than seven per cent. to be absolutely void, as well as the forfeiture of treble the value, was repealed, and the lender was allowed to recover the sum actually loaned without interest or costs, so that, practically, the only penalty was the loss of all interest and costs. By the

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act of 1866 all acts and parts of acts limiting the rate of interest which might be agreed upon by the parties, were repealed; so that parties might lawfully contract for any rate they pleased, but in the absence of any agreement in writing as to the rate of interest, the legal rate of interest should remain at seven per cent.; and the same rate should be allowed on all judgments and decrees of any court.

By the act of 1877, now incorporated as section 1288 in the General Statutes, which was the law in force at the time the contract in this case was entered into, it was declared that: "No greater rate of interest than seven (7) per centum per annum shall be charged, taken, agreed upon, or allowed upon a contract arising in this State for the hiring, lending, or use of money or other commodity. No person or corporation lending or advancing money or other commodity upon a greater rate of interest shall be allowed to recover in any court of this State any portion of the interest so unlawfully charged; and the principal sum, amount, or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this State to be the true legal debt or measure of damages to all intents and purposes whatsoever, to be recovered without costs." This provision, therefore, restored the law to what it was under the act of 1830, to which it is very similar. On December 21, 1882 (18 *Stat.*, 35), three days after the contract in this case was entered into, section 1288 of the General Statutes was amended by inserting a provision therein whereby parties were permitted to contract for a rate of interest not exceeding ten per cent., by an express agreement in writing to that effect. This act of 1882, in its second section, contains a new and additional provision in these words: "That any person or corporation who shall receive as interest any greater amount than is herein provided for shall, in addition to the forfeiture herein provided, forfeit also double the sum so received, to be collected by a separate action, or allowed as a counter-claim to any action brought to recover the principal sum."

It will thus be seen that under the law as it stood at the time the money was loaned to the plaintiff by the defendant, the only risk which he ran, and the only penalty to which he subjected him-

self *in charging* more than the lawful rate of interest, was the liability to lose all interest and costs in case he had to sue for the recovery of the money lent; and, upon well settled principles, it is quite clear that no subsequent legislation could impose upon him any additional penalty for *doing that act*. But it does not follow, by any means, that the legislature may not, by subsequent legislation amendatory of the former, impose a new or additional penalty for doing some *other act*, which, if done after the adoption of such amendatory legislation, would render him liable to such new or additional penalty. *Charging* usurious interest and *receiving* such interest are two entirely distinct and different things, and may be done, as they were in fact done in this case at two distinct and different times—the one *before*, the other *after*, the passage of the act of 1882. They may also, as in fact they are, by the law as now written, be prohibited under different penalties—the one less than the other; for under the existing law one who simply charges, but does not receive, usurious interest, is liable only to lose the right to recover any interest or costs in case he has to sue for the money loaned, whereas one who receives usurious interest not only incurs that risk, but becomes also liable to pay double the amount so received.

It is important that this distinction should be kept in mind. As is said in 3 *Pars. Cont.*, 123: "The law affects a usurious contract with two consequences, which should be discriminated. One is the avoidance of the contract, the other is the penalty for the breach of the law. Now, the penalty is not incurred until usurious interest be in some way paid or received, although the contract may be avoided for this cause at any time. \* \* \* Although an original contract for the use of money be free from the taint of usury, and consequently can be enforced, yet if usurious interest be actually paid upon it afterwards, the penalty is incurred." In a note the author cites the case of *Pearson v. McGowran* (3 *Barn. & C.*, 700; 5 *Dowl. & R.*, 616), where the venue in action of debt for penalties was laid in Middlesex, and the offence was alleged to be that usurious interest was secured to the defendant by a bill of exchange accepted and afterwards paid by a person named Bottrill. On the trial it appeared that the contract was made and the acceptance given in

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Middlesex, but that the bill was paid in London to the holders, to whom the defendant had indorsed it. Abbott, C. J., delivering the opinion of the court, referred to the statute providing that any person taking, accepting, or receiving above £5 per cent. interest, should forfeit the treble value of the moneys lent, and providing that the forfeiture should be sued for in the county where the offence was committed, and said: "Then the only question is, what is the offence? We think it consists in taking, accepting, and receiving usurious interest. The corrupt contract precedes and forms no part of the taking, therefore the offence here was not committed partly in Middlesex and partly in London, and the only materiality of the contract is to show the real nature and consequent illegality of the taking. \* \* \* We are of opinion that the venue in this case ought to have been laid in London, and not in Middlesex." That case clearly recognizes the distinction between the making of a contract, wherein usurious interest is charged, and the taking or accepting such interest afterwards, and that the one forms no part of the other, and the only need of referring to the original contract at all is for the purpose of ascertaining whether, at the time such contract was made, the interest charged was usurious. If it was, and such interest is afterwards received, it is *then* that the offence for which the penalty is imposed is committed, and must be dealt with under the law as it *then* exists.

Applying these principles to the case now under consideration, in which it is, and must necessarily be, conceded that at the time the contract was originally made the interest charged therein was usurious, it is clear that it was error to hold that the defendant could not be subjected to the penalty imposed by the second section of the act of 1882, for receiving, *after the passage of such act*, usurious interest, either upon the ground that such act impaired the obligation of the original contract, or that such act would otherwise be given a retroactive effect.

What was the original contract? Under the law, as it then stood, it was simply a contract for the repayment of the sum of nine hundred dollars, the sum actually lent. All beyond that was illegal and void. Although the note by which the contract was evidenced purported to contain an obligation to pay more

than that sum, yet there was no legal obligation to do so—no legal or valid contract to pay anything more. For although the act of 1830 did repeal that provision of the act of 1777, whereby “all bonds, specialties, contracts, promises, and assurances whatsoever,” whereby a greater rate of interest than seven per cent. was reserved, were declared to be “utterly void and of no effect,” yet the same act, as well as the act of 1877 (*Gen. Stat.*, 1288), also contained a provision forbidding the recovery of anything more than the sum actually lent, without interest or costs, the effect of which necessarily was, to make the contract void for everything which it purported to secure beyond the amount actually lent; for when the lender was denied the right to recover any interest at all, the contract was to that extent deprived of all legal obligation, which is one of the necessary incidents to every legal and valid contract, and without which it cannot exist.

This view is supported by the case of *Gaillard v. LeSeigneur* (1 *McMull.*, 225), where it is held that a note given entirely for usurious interest was absolutely void, not only under the act of 1777, but also under the act of 1830; for, as was said by Johnson, J., in *Magwood v. Duggan* (1 *Hill*, 182): “It is an universal rule that contracts which have for their object anything which is repugnant to justice or against the general policy of the common law, or contrary to the provisions of a statute, are void.” It is true that Moses, C. J., in *Ex parte Montieth* (1 *S. C.*, 231), in speaking of a bond in which an illegal rate of interest was contracted for, does say: “The bond under the act of 1830 (6 *Stat.*, 409) was not void;” but the language used by him in the very next sentence shows that what he really meant was that the entire bond was not void, but only so much of it as secured the payment of the interest.

The true view of the matter is, that while under the act of 1777, forbidding a charge of more than seven per cent. interest, a note or other contract purporting to secure a greater rate of interest, was declared to be absolutely void, not only for the interest, but also for the principal sum, so that a party who violated the statute lost his entire debt, principal as well as interest, under the act of 1830, as well as under the act of 1777, the penalty is not so great, and only extends to a loss of all the

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interest. But as the law still forbids the taking or charging more than the lawful interest, where a note or other contract purports to secure the payment of usurious interest, such contract, while not void *in toto*, but is valid to the extent of the sum actually lent, yet is void so far as the interest is concerned, because, as said by Johnson, J., *supra*, it is "contrary to the provisions of a statute."

We do not think, therefore, that the application of the second section of the act of 1882 impairs the obligation of any contract. The constitutional provision invoked must necessarily be regarded as designed for the protection of legal and valid contracts only, and not for the protection of those declared by statute to be illegal. Now, as we have seen, the only legal and valid contract in this case was a contract for the repayment of the sum of nine hundred dollars—the sum actually lent—and that contract is in no wise infringed upon, or in any way impaired, by the application which it is proposed to make of the act of 1882. The defendant, who lent the money, still had the unimpeachable right to recover and receive from the plaintiff, the borrower, the full sum of nine hundred dollars, notwithstanding the passage of the act of 1882. He not only had this right unimpaired, but as matter of fact in this case, he has fully, and without question, exercised it, for the entire sum loaned has been paid back to him. It is impossible for us to conceive how the obligation of the contract either has been, or could have been, in any way impaired by applying the act of 1882, as it is proposed to do in this case.

Nor do we see how it can be regarded as giving the act of 1882 any retroactive effect. The plaintiff's claim simply is that *since the enactment of the second section of the act of 1882* the defendant has done an act forbidden by the provisions of that section, under a penalty therein prescribed, and he seeks to recover such penalty. How this can be said to give the statute a retroactive effect, we are at a loss to conceive. There is no attempt to make the defendant liable for an act done *prior* to the adoption of the statute imposing the penalty sued for, but the proposition is simply to apply the statute to a transaction occurring subsequent to its adoption. The act complained of here is, *not* the making of a contract in which usurious interest was *charged*,



which did not occur prior to the passage of the act of 1882, and which is not subject to the penalty sued for here; but it is the *receiving* of usurious interest, which occurred after the passage of the act of 1882, and which is subject to the penalty sued for. The two acts, as we have seen, are entirely distinct and different. To apply the language used by Abbott, C. J., in the case hereinbefore cited, we think the offence consisted in receiving the usurious interest. The corrupt contract preceded and formed no part of the taking or receiving the interest; the offence, therefore, was not committed partly by making the original contract and partly by receiving the unlawful interest, and the only materiality of the original contract is to show the real nature and consequent illegality of the taking or receiving. Indeed, as is said by Parsons in the text, *supra*, even if the original contract had been free from the taint of usury, yet if usurious interest had been received afterwards, the penalty would be incurred.

Now, if in this case the usurious interest had been received by the defendant *before* the passage of the act of 1882, then there would be much force in the objection that to apply the act in such a case would be giving it a retroactive effect. So, too, if when the contract was originally made the act of 1866 had been in force, whereby persons were permitted to contract in writing for the payment of any rate of interest they might agree upon, and subsequent to the making of the contract another statute had been passed limiting the rate of interest to seven per cent., and forbidding the receipt of more under a penalty, and the defendant had, subsequent to such last mentioned statute, received the interest contracted for, we can very well understand how it would impair the obligation of the contract to apply the subsequent statute. For in the case supposed the defendant would have a valid, legal, vested right, not only to contract for, but to receive the rate of interest agreed upon and specified in the note, and no subsequent statute could have the effect of abridging, or in any way impairing, such right. But the case actually before us for determination is very different from the case supposed. Here, when the original contract was made, the defendant violated the law in inserting in the contract a promise to pay a greater rate of interest than that allowed by law, whereby the contract was

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not only rendered void as to the payment of any interest, but the defendant also subjected himself to a liability to forfeit his right to recover either interest or costs in case he had to sue for the recovery of his money; and when by his subsequent act he received the usurious interest, he violated another statute which had been enacted more than a year previously, and he must pay the penalty imposed by such statute for a violation of its provisions.

It only remains for us to consider the several cases relied upon by counsel for respondent for the purpose of showing that they do not apply. We do not, however, deem it necessary to go over the authorities cited from the Supreme Court of the United States and elsewhere in reference to the provision of the constitution forbidding the enactment of any law impairing the obligations of contracts, or in reference to retroactive legislation, because, as we have shown under our view the application of the second section of the act of 1882 does not impair the obligation of any contract, nor is it given any retroactive effect. We propose, therefore, to confine our attention to the cases in our own State relating to the matter of usury, the subject more immediately under consideration.

In the case of *Magwood v. Duggan* (1 *Hill*, 182) the action was on a note executed prior to the passage of the act of 1830, and fell, therefore, under the provisions of the act of 1777. The plaintiff claimed that, under the provisions of the act of 1830, he was entitled to recover the principal sum loaned without interest; but the court held that the contract must be governed by the law in force at the time it was entered into (the act of 1777), under which the plaintiff was entitled to recover neither principal nor interest. This was upon the principle that the so-called contract, when entered into, being illegal—"contrary to the provisions of a statute"—was absolutely void under the provisions of the act of 1777, and never was a valid contract. Hence no subsequent legislation could make it so, for that would be substituting the will of the legislature for the agreement of the parties. If the parties had not succeeded in making a valid contract, the act of 1830 could not make one for them. How this case helps the defendant, we are unable to understand. In-

deed, the principle upon which that case rests lies at the very foundation of the view which we have adopted, to wit, that a contract, so far as it is in violation of the provisions of a statute, is an absolute nullity, and is of no binding force on the parties.

In *Gilliland v. Phillips* (1 S. C., 152) the action was on a bond executed in 1860, purporting to secure the payment of usurious interest. The action having been commenced after the passage of the act of 1866, and the case having been heard prior to the re-enactment of the usury law in 1877, it was contended that the plaintiff was entitled to recover the full amount of the bond, interest as well as principal, inasmuch as the repeal of the usury laws by the act of 1866 relieved him from the forfeiture provided for in the act of 1830. But the court held that the contract must be construed according to the law in force at the time it was made. That law was the act of 1830, and under its provisions the borrower was only legally liable for the principal sum without interest. This was a part of the contract, and its terms cannot be changed by subsequent legislation. The act of 1866 could not, therefore, have the effect of extending the liability of the borrower beyond the terms of the contract as originally made, and consequently the plaintiff was only entitled to recover the principal sum lent, as that in the eye of the law was all that the defendants ever contracted to pay. This case, so far from being in conflict with, rather appears to support the view which we have adopted. For it being unlawful, at the time the note sued upon in this case was given, to charge more than seven per cent. interest, the note, in which more is charged, can only be regarded as a contract to repay the sum actually lent—nine hundred dollars—and with that contract we do not propose to interfere.

In the case of *Ex parte Monteith* (1 S. C., 227), the petitioner had suffered a decree for foreclosure of a mortgage to go against her by default; but subsequently becoming satisfied that usurious interest was provided for in the bond which the mortgage was given to secure, she filed a petition for leave to file a bill of review, with a view to enable her to set up the defence of usury. The court held that the facts stated in the petition were not sufficient to warrant the granting permission to file a bill of review;

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and that is all that the case really decides. But even if we should consider what is said in the opinion of the court as to the operation and effect of the usury law, we find nothing in conflict with the view which we have adopted, except the single remark of Moses, C. J., that the bond under the act of 1830 was not void, which has hereinbefore been explained. It is very manifest that the case was decided mainly on the ground that the petitioner having neglected to avail herself of the defence of usury at the original hearing of the case, could not be permitted to file a bill of review simply to enable her to set up such defence. The case, however, seems to be relied on mainly as the basis of an argument, that if the court would not relieve a party who had failed to set up the defence of usury when sued, it would still less be disposed to lend its aid to a party who had actually performed his whole contract, not only by repaying the money borrowed, but also the usurious interest thereon. This argument ignores the express terms of the statute upon which this action is based. According to those terms the penalty is not incurred, and hence the right of action therefor cannot arise, until the usurious interest is paid—received by the lender; and it would be very singular, to say the least of it, if a party could estop himself from the right of action for the recovery of the penalty by doing the very thing which alone gives rise to the right of action.

The remaining case relied on by defendant's counsel is the case of *Bowden & Earle v. Winsmith* (11 S. C., 409), in which the action was on two notes, dated March 14, 1877, bearing interest at the rate of two per cent. per month after maturity; and the question was whether the plaintiff could recover the interest as specified in the notes, or whether the defendant was not entitled to the benefits of the subsequent act of December 20, 1877, restricting the recovery to the principal sum without interest or costs. The court very properly held that the plaintiff was entitled to recover the full amount, both principal and interest, as specified in the notes, saying: "That was the contract of the parties, and at the time it was made there was no law to invalidate it." This is all that the case decides, so far as this matter is concerned, and is but a reaffirmation of the same principle recognized in several of the previous cases cited, and acted upon by us

in this case. The case, however, seems to be cited for the benefit of the language used by the former Chief Justice, in the next paragraph as follows: "The subsequent act of 1877 (16 *Stat.*, 325) fixes the rate of interest (§ 1) at seven per cent. on contracts from and after its passage. Section 2 of that act, presenting certain consequences to arise from establishing a greater rate of interest than that fixed by the first section, must be read as restricted to cases falling under the first section."

It is argued that this language can be used with equal force in reference to the second section of the act of 1882, and the consequences arising under the second section should be restricted to cases falling under the first section. But aside from the fact that the language above quoted from the opinion of Willard, C. J., is nothing more than a *dictum*, which, however, when properly understood, we are not inclined to dispute, it is very obvious that it cannot serve to support the view contended for by respondent's counsel. In the case of *Bowden & Earle v. Win-smith*, the question was whether a contract made prior to the passage of the act of 1877, could be brought under the operation of that act. In that case the rate of interest specified in the notes sued upon was not unlawful or usurious at the time the notes were given, and when, in the first section of the act of 1877, such a rate was prohibited and the rate limited to 7 per cent.; and in the second section it was declared that no person lending money at a greater rate of interest "than is provided for in section 1 of this act" should be allowed to recover anything more than the principal sum lent, without interest or costs, it was very properly held that such prohibition must be confined "to cases falling under the first section," as otherwise the act would be given a retroactive effect upon a contract, which could not be done under the provisions of the constitution. The language relied upon can only be properly construed as expressing the idea (though perhaps the most appropriate terms for that purpose were not used) that the legislature could not by any subsequent legislation add to or vary the terms of a contract previously entered into. Hence when by the first section of the act a greater rate of interest than seven per cent. was prohibited, and the consequences arising from an effort to exact more were declared in the second section, it

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was quite natural to confine such consequences to cases arising under the first section, for that was the same thing as saying, what the constitution requires, that this change in the law as to the rate of interest could only apply to contracts entered into after such change was made.

Here, however, the first section of the act of 1882 makes no rate of interest usurious which was not so before, but left the law in that respect the same as it was when the contract now under consideration was made, the only change being a privilege to charge a greater rate than that previously allowed. Hence when, in the second section, a penalty was imposed for receiving a greater rate of interest "than is herein provided for," the effect was merely to impose an additional penalty for that which was unlawful at the time the contract was made, which penalty could not, of course, be exacted except where, as in this case, the unlawful act was done *after* the passage of the act imposing the additional penalty. There is, therefore, no necessity here, as in the case of *Bowden & Earle v. Winsmith*, to confine the operation of the second section to cases arising under the first section for the purpose of avoiding any conflict with that provision of the constitution which forbids the passage of any law impairing the obligation of contracts, or for the purpose of preventing the giving of a retroactive effect to the act of 1882; for here, as we have seen, the act of 1882, as herein construed, does not impair the obligation of any pre-existing contract, nor is it given any retroactive effect whatever.

But in addition to this, while it is entirely true, as is said in *Potter's Dwarries on Statutes*, page 165, and recognized in *Nichols v. Briggs* (18 S. C., 482), that "where an amendment of a statute is made by declaring it shall be amended so as to read in a given way, the amendment has no retroactive force; the new provision is to be understood as taking effect at the time the amended act would otherwise become the law," yet it by no means follows that the original provisions of the statute, unaffected by the amendment inserted, are to be regarded as taking effect only at the date of such amendment. On the contrary, the strong implication from the language used by that distinguished author is just the other way. For when it is said, "*the amendment has*

no retroactive force; *the new provision* is to be understood as taking effect at the time the amended act would *otherwise* become the law," it is necessarily implied that the original provisions of the act, not affected by the amendment, are to be regarded, so far as the time of their taking effect is concerned, as if no amendment had been inserted.

Now, in this case, under the law as it existed at the date of the contract, it was unlawful to charge or receive any greater rate of interest than seven per cent., and the only change made by the first section of the act of 1882—the only "new provision" inserted—was the privilege to charge and receive as much as ten per cent. This "new provision," under the authority above cited, could not take effect until the passage of the amendatory act, but in all other respects the law *remained* as it was at the date of the contract. It was not then for the first time enacted, nor was it then re-enacted, but it was then simply republished as the law which had been in force since its original enactment. Indeed, so far as this case is concerned, the first section of the act of 1882 may be practically regarded as precisely the same as it was at the time of the making of the contract, for the new provision inserted in the old law by the amendment could not take effect until the passage of the amendatory act, which being subsequent to the date of the contract, could not apply to or in any way affect it.

Again, it is asked: "Suppose the defendant here had brought suit on the note, would the plaintiff here [have] been allowed to file a counter claim under the second section of the act of 1882, and get credit on his note to extent of double the amount of usury charged in the note?" We agree with the counsel when this question is answered in the negative, for the very simple reason that the statute does not impose the penalty sued for in this case for *charging* usury, but only for receiving usurious interest. Hence, until such interest has been received, no such penalty has been incurred, and therefore, in the case supposed, the borrower could neither collect by a separate action, nor be allowed as a counter-claim to an action to recover the sum actually loaned the amount of said penalty, because none had been incurred. But if the borrower had paid usurious interest on the note, and

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after such payment the lender had brought his action to recover the amount of the note, it is clear that the borrower might set up as a counter-claim to such action double the sum of the usurious interest so paid, because the statute so expressly provides.

It seems to be supposed that the allowance of such a counter-claim operates in some way to impair the obligation of the contract, which all concede to be good to the extent of nine hundred dollars, inasmuch as it reduces, as it is claimed, the amount or value of such contract to the extent of the penalty allowed. This view is based upon an entire misconception of the true nature and real operation of the counter-claim as allowed by the act of 1882. It is not in the nature of a defence to the plaintiff's claim, in which the validity or amount of such claim is assailed, on account of some defect therein, or some objection thereto, and it does not operate as a *reduction of*, but as a *deduction from*, the amount claimed by the plaintiff. On the contrary, it assumes the full validity of the plaintiff's claim, and only serves to set up a distinct and independent claim, the amount of which should be deducted from the claim of the plaintiff. It is like a case in which a plaintiff brings an action on a note given for money borrowed, and the defendant sets up as a counter-claim a note subsequently given to him by the plaintiff for a horse. There the defendant by his counter-claim makes no assault on the claim of the plaintiff, and does not seek to invalidate it in any way, but may, on the contrary, fully admit its validity, and yet, if his counter-claim is established, he may claim that the amount of it shall be deducted from the plaintiff's claim, and that the plaintiff is only entitled to judgment for the balance. So in this case, if the plaintiff, instead of paying the entire note, principal as well as interest, had only paid the usurious interest, and the defendant had brought his action to recover the sum actually loaned—nine hundred dollars, we see no reason why the plaintiff here could not have set up as a counter-claim, a demand for double the sum of usurious interest paid by him, and claim that judgment should be rendered for the difference only; for such a defence would not assail or in any way impugn the original contract, admitted to be good and valid for the repayment of the nine hundred dollars, but would be simply a claim that the amount of a



liability which Trimmier had subsequently incurred to Hardin, should be deducted from Trimmier's confessedly valid claim for nine hundred dollars, and judgment rendered for the balance only.

It seems to us, therefore, that in any view which may be taken of this case, the plaintiff was entitled to recover under the provisions of the statute, and hence the other question presented, as to whether the plaintiff could not at common law recover back the money actually paid, does not properly arise and need not be considered.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

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MONDAY v. ELMORE.

1. The difference stated between an attachment issued irregularly and improvidently.
2. Where the affidavit, upon which a warrant to enforce an agricultural lien was issued, states the renting of land by the affiant to the defendant, the giving of a note by defendant, its amount, that it was justly due and payment had been refused, the existence of the debt is sufficiently stated.
3. And where the affidavit further stated that the rent note was due, and that defendants positively refuse to pay the said rent, and are actually disposing of the crops subject to the lien and to defeat the same, the trial justice properly issued the warrant.
4. In attachment proceedings there is no prior existing lien, and the mere disposition of property does not show an intent to defraud; but under an agricultural lien the disposition of property to defeat its lien shows an unlawful intent.
5. Where a rent note is given to two persons, one of whom afterwards dies, the survivor is entitled to the remedies given by law for its collection, no matter who owned the land.

Before ALDRICH, J., Laurens, March 1887.

The contract of rent in this case was as follows:

STATE OF SOUTH CAROLINA—Laurens County. Articles of agreement between Amanda S. and James A. Monday and Lura C. Elmore and Berry Elmore.

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We, Amanda S. and James A. Monday, on the first part, do agree to rent our houses and all the cultivatable lands for them to cultivate for the year 1886, for the sum of sixty dollars, to be paid in money on or before the first of November, 1886. We except the wood lands to do with them as we please.

We, Lura C. Elmore and Berry Elmore, the second party, do agree to pay the said Amanda S. and James A. Monday, as specified above, sixty dollars by the first of November, 1886, for the rent of their house and cultivatable lands. We also agree that the crop that is made on the place be bound for the rent specified. We further agree to take good care of the place.

Witness our hand and seal, Nov. 16, 1885.

(Signed) LURA C. ELMORE, [L.S.]

(Signed) BERRY X<sup>his</sup> ELMORE, [L.S.]  
mark.

TEST: A. M. ROBERTSON.

The affidavit upon which the warrant issued was as follows:

STATE OF SOUTH CAROLINA—County of Laurens.—James A. Monday, plaintiff, v. Berry Elmore, Lura C. Elmore, defendants.

Personally appeared before me, D. W. Anderson, trial justice for the said county and for the said State, James A. Monday, who, being duly sworn, says: That he, with his wife, Amanda S. Monday, did rent to Berry Elmore and Lura C. Elmore, a certain tract of land in the said county and said State, for the year 1886, to be used for farming purposes during the said current year, taking a lien note to further secure the payment of said rents. That sixty dollars of the said rent is now justly due the said plaintiff, and that the said Berry Elmore and Lura C. Elmore positively refuse to pay him the said rent, and is actually disposing of said crops subject to lien, and to defeat the same to the great injury of deponent. Wherefore he prays that a warrant may be issued to seize said crop.

(Signed) JAMES A. MONDAY.

Sworn to and subscribed before me, this 2d day of November, 1886.

D. W. ANDERSON, [L.S.]

*Trial Justice, L. C.*

Other matters are stated in the opinion of the court.

*Messrs. Ball & Watts*, for appellants.

*Mr. B. D. Cuninghame*, contra.

July 8, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff, respondent, and his wife, Amanda, since deceased, in November, 1885, rented to the defendants, appellants, a certain tract of land situate in Laurens County, for the year 1886, for \$60, payable on or before the 1st day of November, 1886, the contract being evidenced by a written instrument under seal signed by the said appellants, in which it was stated that the said Amanda and the said James A. Monday had agreed to rent said premises, and that the defendants agreed to pay for the same the sum of \$60, by the first day of November, 1886, the defendants further agreeing therein that the crop made on the place should be bound for the rent specified. This paper was properly indexed in the office of R. M. C., Laurens County, November 23, 1885, and a copy will be found in the "Case."

On November 2, 1886, the respondent made an affidavit before D. W. Anderson, trial justice for said county, in substance stating the contract of rent; that the \$60 was due him; that the defendants had refused payment, and were actually disposing of the crops subject to the lien, to defeat the same; upon which he prayed a warrant to seize said crop. At that time his wife, Amanda, was dead. The trial justice issued the warrant, and two bales of cotton were seized.

The defendants, through their counsel, after notice, moved the trial justice to dissolve the attachment as improvidently and illegally issued. This motion was refused by the trial justice, and the attachment sustained. Whereupon an appeal was taken to the Court of Common Pleas on the grounds following, to wit: 1. That the attachment was improvidently and illegally issued, the sufficient facts not being set out in the affidavit. 2nd. That it does not appear from the affidavit that the plaintiff had a right of action. And 3rd. That the evidence showed the plaintiff had no right of action. The Circuit Judge dismissed this appeal with costs. And the case is now before this court upon exceptions as follows: I. That the affidavit on which the attachment was issued was insufficient. II. That his honor did not sustain the appeal on the grounds that the attachment was improvidently and illegally issued, the facts stated not being sufficient. III.

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Because it did not appear from the affidavit that the plaintiff had a cause of action.

The act of 1885, p. 429, provides that a warrant of seizure under agricultural liens issued by the clerk of the court or a trial justice, may be dissolved or vacated for any of the causes which would be sufficient to vacate a warrant of attachment issued under the code. An attachment issued under the code may be dissolved for one of two causes; first, because the attachment has been irregularly issued, and second, because it has been improvidently issued. The difference between these causes is this: an attachment is irregularly issued when it appears upon the face of the proceedings that there is no ground for the attachment—in other words, where the affidavit fails to contain the conditions upon which the law authorizes such a proceeding, to wit, that a cause of action exists, that a certain sum is due, and that the defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his property with intent to defraud his creditors. It is improvidently issued when the conditions necessary are stated, but they are untrue, which fact being shown by the defendant, the attachment may be dissolved. *Ivy v. Caston*, 21 S. C., 588.

From the language of the exceptions here, we suppose that the warrant of seizure issued in this case is assailed upon both of the grounds mentioned. The first exception raises the question whether the facts stated in the affidavit were sufficient. The third and last whether a cause of action is stated therein. These two exceptions are based upon irregularity, to wit, that the necessary facts do not appear upon the face of the proceedings—the first alleging irregularity generally, and the second specifically, to wit, the absence of one of the necessary conditions—the existence of a cause of action.

The second exception is founded upon an averment that the attachment was “improvidently and illegally” issued. We suppose this exception was intended to raise the question that the facts stated were untrue, because it is only in such case that an attachment can be said to have been improvidently issued, although appended to this exception is the statement: “The facts stated not being sufficient”—the exception as a whole reading

thus: "That his honor did not sustain the appeal on the grounds that the attachment was improvidently and illegally issued, the facts stated not being sufficient." If the last clause was intended to qualify the foregoing part of the exception, then this exception does no more than raise the question of the other two, to wit, of irregularity appearing on the face of the proceedings, and it would be disposed of in the discussion of the other two. But if full significance is to be given to the words "improvidently and illegally," which are the words used in the act of 1885, *supra*, then it will be necessary to inquire whether the defendants submitted sufficient evidence of the untruthfulness of the facts stated in the affidavit.

The first question, however, is, was the proceeding defective for irregularity? Does it appear that the affidavit was deficient either generally or specifically? All that the code requires to be stated for the issuance of an attachment so as to avoid successfully an assault for irregularity is, that a cause of action exists as against the defendant, specifying the amount of the claim, &c., and that the defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his property, with intent to defraud his creditors. *Code*, 248; *Ivy v. Custon*, *supra*. The affidavit, it is true, does not state in terms that a cause of action existed, but it does state facts from which as a legal conclusion it must be inferred that such cause did exist. It states the renting of the land, the giving of the note, its amount, that said note was just and due the plaintiff, and that the defendants had positively refused payment. If these statements were true, it cannot be said that the proceeding was defective for "irregularity" on account of failure of the necessary statement as to these matters. We do not know that it was necessary for it to appear in the affidavit that the plaintiff was the surviving payee, and for that reason was entitled to collect the rent. The statement that the note was due to him, was an allegation of a cause of action to him, and it opened the door to testimony on that subject at the trial in case this right was denied.

The most serious question is whether the affidavit was sufficient as to the purpose of the defendants in disposing of the property. The code says that an attachment may issue whenever it

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shall appear by affidavit that \* \* \* the defendant is disposing of his property \* \* \* "with intent to defraud his creditors." This precise language is not used in the affidavit, but is not that the charge substantially? The affidavit is not based upon hearsay, information, or belief, but it is a positive oath that the rent note was due, that the defendants were actually disposing of their property, that they had refused payment, and that the object of the disposition was to defeat the lien. It appears to us that this was equivalent to saying that the intent of the defendants was to defraud a creditor.

The cases in our reports upon this subject are *Smith & Melton v. Walker*, 6 S. C., 169; *Brown v. Morris*, 10 *Id.*, 469; *Clausen v. Fultz*, 13 *Id.*, 478; *Ivy v. Custon*, 21 *Id.*, 588; and a recent case, *Mixon v. Holley*, 26 *Id.*, 256. In the four first cases above, the sufficiency of the affidavit, and what is required in such cases were discussed, the court holding that the facts stated must not be stated simply upon information and belief, but that there must be a positive averment of the facts and of the sources from which the information is derived, if the statement is made on information, and that there must be facts stated bearing upon both the conditions of the disposition of the property and the intent thereof. And in the last case above the affidavit was very similar to the affidavit here, where it was stated that *Mixon* had sold a portion of his property and had refused to pay the note with intent to defeat the lien. The court held that it was sufficient, saying: "The fact that *Mixon* having already sold a portion of the crop, over which *Willis & Co.* had a lien, and having refused to pay the proceeds or any other funds upon their claim, was sufficient to satisfy the clerk of the intent of *Mixon*, and no higher evidence could have been furnished that *Mixon* intended to defeat the lien." The affidavit in that case was, "that *Mixon* had sold a portion of his crop, had refused to pay said sum of \$100, with intent to defeat the lien." This was held sufficient; and so we hold here under these authorities.

It must be remembered that this was a proceeding upon an agricultural lien, and while this lien law does provide that the affidavit for a warrant of seizure in such cases should "conform as nearly as may be" to the practice in ordinary attachments, yet

there is this material distinction between the two. In attachment cases there is no lien on the property attached, which it is intended to enforce, and consequently the mere disposition of the property might not in itself perhaps be a sufficient statement showing the intent to defraud. But in agricultural contracts there is a lien, and a statement that the debtor is disposing of the property to defeat this lien, contains facts bearing directly on the intent.

We find no evidence in the case directed to the point of an improvident issuance of the warrant. The only testimony was from the defendant, Laura C. Elmore, that Amanda Monday had died some time in September, 1886, and that she owned the land in fee. The note, however, was given to Amanda and the plaintiff, and it makes no difference who owned the land, the defendants were never deprived of the use of it, and the proof that Amanda had died only showed that the plaintiff was the survivor, and therefore had the right to collect.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

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MARS v. MARS.

1. The powers of agents, general and special, considered and stated.
2. A negotiable note, payable to bearer, or endorsed in blank, is transferable by delivery, and when thus delivered before its maturity, is indefensible in the hands of the holder.
3. Authority given to an agent by the payee of a draft to transfer the draft, carries with it the authority to endorse; and upon the endorsement of the payee's name by such agent, the purchaser acquires a good title.
4. Where an agent was instructed to apply an endorsed draft of the payee to a particular debt, and he transfers it for value to a *bona fide* purchaser, who is ignorant of such instructions, the purchaser is not liable to the payee for the value of the draft.
5. A draft was payable to A & B, who were joint owners thereof, but not partners. A instructed B to deliver it to W in payment of a certain debt. B endorsed the names of A & B on the draft and delivered it to W to be applied otherwise than as directed, and W so applied it, not

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knowing of A's instructions. *Held*, that W was not accountable to A for the proceeds of the draft.

Before HUDSON, J., Abbeville, October, 1886.

This was an action by Thomas W. Mars against Walter W. Mars and F. W. Wagener & Co., to recover \$940.40, proceeds of a draft misapplied by defendants. The jury rendered a verdict in favor of plaintiff against W. W. Mars for the amount claimed, but they found in favor of the defendants, Wagener & Co. The opinion sufficiently states the case.

*Mr. Ellis G. Graydon*, for appellant.

*Messrs. Parker & McGowan*, contra.

July 8, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff, appellant, and the defendant, W. W. Mars, were indebted to the respondents on a promissory note for \$3,000, which was secured by a mortgage of certain real estate of the appellant, T. W. Mars. Some time after this the said appellant and the defendant, W. W. Mars, became possessed of a certain draft for \$2,108.17, known in the case as the Cisco & Son draft, which was payable to the order of W. W. & T. W. Mars, drawn by G. W. Dillingham, cashier of National Bank of Columbus, Ga. The plaintiff, appellant, and the defendant were not partners in business, nor did they sustain any other relation to each other which made them agents of each other. In October, 1880, W. W. Mars went to Charleston, where the respondents resided, and when leaving his home in Abbeville County the appellant delivered to him the Cisco & Son draft, with instructions to apply it to the mortgage debt above to the respondents. The draft at that time was unindorsed. W. W. Mars, on reaching Charleston, indorsed it, and instead of crediting the proceeds on the mortgage debt to the respondents, transferred it to said respondents in the purchase of goods and otherwise for his own purposes, with the exception of a small amount, some \$227.36, which was credited on the mortgage debt.

The appellant brought the action below to recover his half of



said draft, alleging that W. W. Mars had no right to transfer it as he did. Under the charge of the Circuit Judge the verdict was for the defendants, respondents. The main question below was as to the effect of the transfer of the Cisco & Son draft by W. W. Mars to the respondents. Upon this question his honor charged, in substance, that the authority given by T. W. Mars to W. W. Mars to transfer the draft to the respondents, carried with it the power to indorse it, and that when it was thus indorsed, in the absence of any knowledge on the part of the respondents that it was indorsed for a particular purpose, it became a general indorsement, authorizing its transfer for any purpose; or rather, when thus indorsed, the respondents could safely take it, free from accountability to the true owner, said respondents having no knowledge that W. W. Mars, the agent, was violating his instructions. The correctness of this charge is the principal question in the appeal.

[There are two classes of agents, general and special, and their powers, when properly analyzed, are governed by the same general principle, to wit: they can do anything within the scope of their agency so as to bind the principal, notwithstanding there may be some secret instructions limiting the powers.] A general agent has a wider and broader scope than the special, it is true, but each within his scope can do anything necessary to consummate the object of the agency, so far as third parties are concerned, unless there be a special limitation brought home to such third parties. Under this principle an agent, general or special, in the possession of an ordinary chattel, may deal with it as to third parties to the full extent of the scope of his agency (in the absence of any known limitation), and his action will bind his principal, although against private instructions; but if he steps beyond that scope, his act is illegal and invalid. So that in ordinary agencies, and with reference to ordinary goods and chattels, a third party dealing with an agent deals with him at the peril of showing that the act done was within the scope of the powers of the agent. See the case of *Carmichael v. Buck*, 10 Rich., 332, 70 A. D., 226.

This doctrine does not apply, however, to the full extent herein above, to the transactions of an agent entrusted with com-

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mercial papers, negotiable notes, drafts, &c., &c. In the interest of commerce and trade, such papers have long been governed and controlled by principles of their own, which apply wherever they are made the subject or the instruments of a transaction. One of these principles is, that a negotiable note, when payable to bearer, or when payable to the order of another, and has been indorsed by that other, is transferable by delivery, and if thus delivered before due, it is indefensible in the hands of the holder. Under this principle, if the draft in question here had been indorsed by T. W. & W. W. Mars, the plaintiff, of course, would have had no cause of action to recover the proceeds from the respondents. It is said, however, that the plaintiff, appellant, did not indorse it. That is true, to the extent that he did not do so personally and by his own individual act, but the maxim is, *qui facit per alium, facit per se*. We think that the Circuit Judge properly charged that the authority to W. W. Mars to transfer the draft to the respondents necessarily carried with it the power to indorse it in the name of T. W. & W. W. Mars, because there was no other way by which it could have been legally transferred, except by such indorsement. The indorsement, then, was as much the act of the appellant as if he had personally written the indorsement himself.

W. W. Mars, when he went to Charleston, was charged by T. W. Mars with two duties or powers, first, to indorse the draft, second, to deliver it to the respondents in payment of the mortgage debt after it was indorsed. The second duty he violated, but the first he performed, and performed it with authority, which bound his principal. When this was performed the negotiability of the draft, which quality the indorsement gave it, intervened, and at once relieved the respondents from the necessity of looking into the purpose of the indorsement. He found it a negotiable paper, and under the commercial law was well warranted in taking it for whatever the then holder chose to dispose of it. He was under no obligation to inquire what the holder intended to do with it; or what he could do with it. It was in a condition to be passed from hand to hand, and placed so by the act of the proper parties apparently. The only peril he was under was whether the indorsement was in fact made by the pro-

per parties. This was his only risk. All this, it is true, is based upon the assumption that respondents had no knowledge of the instructions given to W. W. by T. W. Mars, limiting his power of transfer, which it seems the Circuit Judge explained in his charge.

We conclude, then, that there was no error in the charge of his honor as to this main point in the case. We think that the cases of *Cone v. Brown*, 15 *Rich.*, 262, and *Diercks v. Roberts*, 13 *S. C.*, 338, are conclusive of this question.

All of the plaintiff's requests to charge, and the refusals of which are made grounds of exceptions, are met by the position that W. W. Mars had authority to indorse the draft. It was not denied that he was authorized to transfer; it then followed that he was authorized to indorse, as a legal conclusion. Such being the fact, W. W. Mars did not exceed his powers as to said indorsement; he only exceeded them after said indorsement, when he made an unauthorized use of the draft. The only question of interest in the matter, then, to the respondents was, did W. W. Mars have the power to indorse, and of this no doubt it would have been safe and well for him to inquire; but if he was willing to take the draft, running the risk of W. W. Mars having no such power, no one else could complain. If it had turned out that W. W. Mars had been invested with no such power, then the respondents would have been compelled to refund.

The substance of his honor's charge, when taken as a whole, including his response to requests on both sides, was, that if W. W. Mars, when he went to Charleston with the draft in his hands, had authority to transfer it to the respondents, he had the power to indorse it, and that after being indorsed, unless the respondents were informed of the special instructions given to W. W. Mars, as to the use to be made of it, said respondents could take it safely and without accountability. The questions involved in this we have discussed, and we think our conclusion has disposed of all other questions raised in the exceptions of appellant. We deem it unnecessary, therefore, to take up these exceptions *seriatim*.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed, as there is no appeal as to W. W. Mars.

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STATE *EX RELATIONE* THE COLUMBIA BRIDGE COMPANY  
v. THE CITY OF COLUMBIA.

1. For the purpose of creating the town (now city) of Columbia, and establishing it as the seat of government, the legislature by statute directed certain commissioners to lay off a tract of land of two miles square near Friday's Ferry, on the Congaree River, into lots of half an acre each, with streets, &c., which land was vested in said commissioners and their successors for the use of the State. These commissioners made and filed their map showing three sides of this square laid off, but leaving the western or river-side boundary open. *Held*, that under the requirements of the statute, and upon the presumption that the commissioners did their duty, the western boundary was not the river bank, but a straight line from the N. W. to the S. W. point, and that so much of said river as was included in such line was within the corporate limits of the city of Columbia.
2. Where a stream not navigable is laid down as a boundary, the grant extends to the centre of the stream; and this same rule applies where land is taken for some public purpose under the right of eminent domain, particularly where the land is so acquired by regular purchase.
3. The municipal charter of Columbia embraced all the territory which the act directed the commissioners to lay off, and not merely such land as should be laid off by them.
4. The common recognition of a boundary by the citizens, and acquiescence therein by the municipality, will be adopted by the court as determining the true boundary only where such boundary is otherwise vague and indefinite; and boundaries may be defined by long use, confirmed by legislative recognition. But failure to tax property is not an admission by the city that such property is without the city limits; and legislative authority to build a bridge "over the Congaree River, opposite the town of Columbia, at the western extremity of Gervais Street," was not a legislative recognition that the eastern bank of said river was the western boundary of the town.
5. A part of the Congaree River being within the corporate limits of the city of Columbia, so much of a bridge across said river as is within those limits is taxable by the city, and a writ of prohibition to restrain the levy of taxes thereon should not be issued.

Before ALDRICH, J., Richland, July, 1886.

The appeal in this case was from the following order:

This is an application for a writ of prohibition, to prevent the

respondent from collecting a tax on the bridge of the petitioner. On March 22, 1786, the legislature passed "an act to appoint commissioners to *purchase land* for the purpose of building a *town*, and for removing the seat of government thereto." The commissioners were "authorized and required to lay off a *tract of land* near Friday's Ferry, on the Congaree River, including the plain of the hill whereon Thomas and James Taylor, Esqs., now reside, into lots of half an acre each, which *land* shall be, and the same is hereby, declared to be vested in the said commissioners, and their lawful successors, for the use of this State." It is further enacted in section 3: "That as soon as the said *tract of land* shall be laid off into *lots* as aforesaid," &c.

The question is, what did the legislature authorize and require? and what did the commissioners do? Undoubtedly the legislature did not require the commissioners to purchase water. It intended them to buy land two miles square, not *in*, but *on*, Congaree River; to lay out a town in half acre lots; to reserve a square, or squares, of eight acres for public buildings, and make streets and highways for the use of the inhabitants of the future town. That, as I conceive, was clearly the legislative intent.

What, then, did the commissioners do? The old plats and maps show, and the surveyors concur, that they started at a point in the centre of the town, ran a mile to the outer limit of the city opposite the river, a mile each way from this line, and from the corners thus reached two miles to the river; from the corners on the river they followed the bank of the stream. But in this water line the river comes into the town, and this line from the river bank to the initial point is less than a mile.

In 1823 the legislature incorporated the Columbia Bridge Company "to erect a bridge over the Congaree River, *opposite* the town of Columbia, at the western extremity of Gervais street." There are islands in the river above the bridge. The one nearest the bridge is the property of Mrs. Perry. It formerly belonged to the estate of Mayrant. Now, if the corporate limit of the city is a straight line from the N. W. and S. W. corners of the square on the bank of the river, nearly the whole length of the bridge, and the islands in the river above the bridge, are within the corporate limits.

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On the part of the city it is contended that the two miles square on the river, which the commissioners were directed to purchase to lay out a town, vested in them title to the middle of the stream, giving to the city all the rights of riparian proprietors. Is that the true construction? This act cannot be likened to a grant of vacant land on a stream, issuing from the land office. It is not a grant at all in the technical sense of the term. It is an authority vested in certain commissioners to purchase two miles square of land on the Congaree River, to build a city for the capital of the State. I do not see how the question of riparian rights comes in at all. The commissioners are not required to buy for agricultural or manufacturing purposes, or for navigation, but to build a town. If, then, they did acquire by bargain and sale from the Taylors, and whoever else owned the land, the lots delineated in the plat, that is the area of the city of Columbia.

It is a recognized principle in England, and our own country, that "boundaries may be defined by long use." See Dillon and Sedgwick, and cases cited. Can there be a doubt that the city of Columbia has acquiesced in this location, that the river bank is the limit of the city—from the building of the bridge to the day the tax was levied, nearly, if not quite, sixty years? What does long acquiescence show? That it was never claimed either by the commissioners who laid out the city, the city authorities, the inhabitants, or the police, that the city limit extended beyond the *bank of the river*.

The case is interesting, and I might extend this opinion, but I have neither the strength, time, nor the inclination in this hot weather, with Edgefield court before me next week, to say more than is necessary to decide the question presented.

It is therefore ordered that a writ of prohibition do issue out of this court, directed to the city of Columbia, and to Samuel W. Rowan, sheriff of Richland County, and all officers acting under them, or either of them, prohibiting them from in any manner enforcing the execution, or in any other manner offering the said property for sale for the payment of the said tax. And that they utterly desist in every matter touching the premises. Respondents to pay the costs as for an action at law.

From this order the city of Columbia appealed upon the following exceptions:

1. That his honor erred in construing the act of 1786 not to include waters.
2. That his honor erred in admitting the testimony of surveyors as experts as to what the commissioners named in the act did.
3. That he held that the commissioners followed the bank of the river as the western boundary.
4. That he did not hold that the corporate limit is a straight line from the northwest to the southwest corners on the bank of the river.
5. That he erred in holding that the act of 1786 cannot be likened to a grant, and the question of riparian rights does not come in at all.
6. That there is no sufficient evidence to show that the city by acquiescence and use fixed the bank of the river as the western boundary, and the same is not in fact true.
7. That his honor erred in holding that the bank of the river is fixed as the western boundary of the city by long acquiescence.
8. That even if it be true that the commissioners ran the bank of this river as the western boundary of the city, his honor erred in not holding as matter of law that the corporate limit extended to the middle of the stream.
9. That his honor erred in granting the writ of prohibition.
10. That his honor erred in ordering respondents to pay costs as for an action at law.

*Mr. Allen J. Green*, for appellant.

It must be conceded that the bridge is taxable if within the city limits. *Gen. Stat.*, § 167; 2 *Dill. Mun. Corp.*, § 628; 13 *Rich. Eq.*, 50; *McMull. Eq.*, 144. The city limits do not stop at low water mark on the east bank of Congaree River; but this fresh water river not being navigable, the true line of the city's western boundary is the centre of the stream. 1 *Dill. Mun. Corp.*, § 124, note; 13 *Pick.*, 431; 9 *Cush.*, 492; 24 *How.*, 41; 4 *Rich.*, 68; 5 *Rich. Eq.*, 77; *McMull. Eq.*, 294. These authorities show that a grant of land on a stream not technically navigable carries exclusive right to the centre of the stream, unless the terms of the grant denote an intention to stop on the margin; that no river is technically navigable where the tide does not ebb and flow; and parol testimony is inadmissible to show the intention of the parties.

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Besides, as a conveyance carries title to the centre of the stream, so the land purchased by the commissioners as trustees extended to the centre of Congaree River, and the land so purchased became, under the act, a part of the town of Columbia.

The doctrine that boundaries may be defined by long use, does not apply to a case like this, but only where the boundary lines are vague and indefinite. 1 *Dill. Mun. Corp.*, § 125, note 1, § 353, note; 13 *La. An.*, 69; 13 *Gratt.*, 389; 35 *Ill.*, 562; *Sedg. Stat. & Const. L.*, 255. *Communis error facit jus* applies only in cases of doubt where rights of others have become vested, and it would work great inconvenience and upset titles to land. 10 *Wheat.*, 62; 18 *S. C.*, 351; 23 *Id.*, 68; 24 *Id.*, 567; 3 *Barb. Ch.*, 528. The decisions favor the upholding of vested rights; and in doubtful cases, the decision should uphold the revenue of a city. 10 *Rich.*, 244. If this bridge was not taxed prior to 1871, it may be because such structures were not then taxable, and it was not a town lot. 13 *Rich. Eq.*, 50. And there was no testimony on this point. Mr. Perry's land was properly taxable in Lexington with the main land, of which it was a part, because on that side of the thread of the stream.

*Messrs. Clark & Muller, contra.*

The sole question in the case is, was this bridge partly within the city limits, and that depends upon the western boundary or limit of the city. Owing to a *detour* of the river, a straight line from the N. W. to the S. W. point almost touches the Lexington bank. The act shows that the legislature only contemplated dry land, and not land covered with water. 4 *Stat.*, 751. This river is a navigable stream. 7 *Stat.*, 561; *Rice*, 450. Subsequent acts throw light on the intention of the legislature in granting the charter. *Sedg. Stat. & Const. L.*, 252; 9 *Stat.*, 497, 523, 530, 531; 6 *Stat.*, 190, §§ 8, 9, 10, 12; *Ibid.*, 267, § 1.

The legislature only incorporated such lands as the commissioners should lay off; the corporate existence was commensurate only with the boundaries fixed by the commissioners. Several surveyors testified in this case that the river is the western boundary on the map of these commissioners. And three other maps



give the same boundary. And this was the only testimony before the court.

Question of riparian rights is not involved in this case, for there was no grant. The lands vested in the commissioners by operation of the statute. The State took only such land as they laid out into lots and streets; the corporate rights only extend to that territory. And the Congaree is a navigable stream. 7 *Stat.*, 561; *Rice*, 450. Besides, this case falls within the exception; the terms of the grant denote an intention to stop at the margin. 3 *Kent*, 427; 4 *Rich.*, 84; *McMull. Eq.*, 294; 17 *Mass.*, 299; 6 *Id.*, 436. The statute did not name Congaree River as a boundary. The evidence of the surveyors was properly admitted as expert testimony. *Stark. Evid.*, 96, note 1; 1 *Greenl. Evid.*, § 440; 1 *Whart. Evid.*, §§ 435, 444; 4 *Pick.*, 158.

July 8, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This was an application for a prohibition to restrain the collection of a tax imposed by the authorities of the city of Columbia, upon the bridge across the Congaree at Columbia, owned by the relator. The Circuit Judge held that no part of said bridge was within the corporate limits of the city of Columbia, and hence that there was no authority for the imposition of the tax complained of. He therefore granted an order that the writ of prohibition should issue, prohibiting the enforcement of the execution which had been issued and placed in the hands of the sheriff. From this order the city council appeal upon the several grounds set out in the record, which need not be repeated in detail here.

It is conceded that the question presented by this appeal turns solely upon the inquiry, what is the correct location of the western boundary of the city of Columbia? By the act of 1786 (4 *Stat.*, 751), for the purpose of establishing a town, to "be called and known by the name of Columbia," and removing the seat of government thereto, certain commissioners were "authorized and required to lay off a tract of land of two miles square, near Friday's Ferry, on the Congaree River, including the plain of the hill whereon Thomas and James Taylor, Esquires, now reside,

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into lots of half an acre each, and the streets shall be of such dimensions, not less than sixty feet wide, as they shall think convenient and necessary, with two principal streets running through the centre of the town, at right angles, of one hundred and fifty feet wide; which said land shall be, and the same is hereby declared to be, vested in the said commissioners, and their lawful successors, for the use of this State." The second section of the act provides for the payment to the proprietors of the land, thus authorized and required to be taken for the establishment of said town, of a generous price for the same, at a valuation to be fixed by the commissioners. The other provisions of the act throw no light upon the question presented, and need not therefore be stated.

In pursuance of the provisions of this act the commissioners appointed for the purpose seem to have laid off the land now constituting the city of Columbia, and made a map of the same, which was filed in the office of the secretary of State. According to this map the northern, southern, and eastern boundaries of the town (now city) of Columbia are laid down as straight lines, two miles in length, but the western boundary, where the Congaree River runs, is left open, and, as we have said, the only controversy is as to the correct location of that boundary line. The relator contends that the correct location of the western boundary is to be found by beginning at the point where the northern line reaches the Congaree River, and running thence down said river, following its various sinuosities to the point where the southern line strikes said river. The appellants, on the other hand, contend that the western boundary can only be correctly located by running a straight line from the point where the northern line strikes the river to the terminus of the southern line on said river; or, at least, upon the principle applicable to proprietors of lands on unnavigable streams, the limits of the city must be held to extend to the middle of the river, and that the western boundary must be located by beginning at a point in the centre of the stream, immediately opposite the terminus of the northern line, and thence running down the river, following the *filum aquæ* to a point immediately opposite the terminus of the southern line. It is conceded that if either of the locations of the western boundary contended for by appellants be established,

a portion at least of the bridge will fall within the city limits, and will therefore be liable to taxation; and hence, in order to sustain the order appealed from, it will be necessary to establish as the western boundary the east bank of the river, under which location no part of the bridge would be embraced within the city limits.

It is difficult for us to conceive of any valid reason why the east bank of the river should be established as the western boundary of the city. It certainly is not so declared in the act authorizing and requiring the laying out of the town, and it is not laid down *as a boundary* on the map filed in the office of the secretary of State. It is true that the river is laid down on the west side of the map, but it is not designated as a boundary, and there certainly is nothing to indicate that the *east bank* of the river was intended to be the boundary. On the contrary, the western boundary is left entirely open, and to determine its correct location we must resort to other considerations. It will be observed that the commissioners are not only authorized, but are *required*, to do certain things and, upon a well settled principle, we must assume, in the absence of any evidence to the contrary, that they did what was required of them by the act. Now, what was required of them? The act shows that they were required "to lay off a tract of land of two miles square, near Friday's Ferry, on the Congaree River, including the plain of the hill whereon Thomas and James Taylor, Esquires, now reside." The only discretion with which they were invested was as to the width of all but the two principal streets, and even that was limited so that none of the streets should be less than sixty feet in width. The requirement that the tract to be laid off should be two miles square, was just as positive and binding as that it should be near Friday's Ferry, or that it should be on the Congaree River, or that it should include the hill on which the Taylors resided. This being their duty, the presumption is that they did it—that they did lay off a tract two miles square; and this renders it necessary to adopt the location of the western boundary as contended for by the appellants; for as it is conceded that the other boundaries are correct, the only possible way of making the tract of land conform to the requirement of the act would be by making the

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western boundary a straight line between the termini of the northern and southern lines.

The little evidence that is obtainable after so great a lapse of time, so far from tending to rebut the presumption that the commissioners did what was required of them by the act, rather tends, in our judgment, to support the presumption. It is manifest that all the lines which were capable of being run by a surveyor, were so run as to form a square, and inasmuch as the only line remaining to complete the required figure—a square—passed through a large stream, and was, therefore, not capable of being actually run out, it was very natural that the commissioners should do exactly what the map shows they did do—leave that line open. There was no real necessity that it should be actually run out by the surveyor, and as the nature of the territory through which it would pass rendered it impracticable to carry the chain over it, the only thing to be done was to leave it open as they did do. The other three lines having been established, the remaining line could be ascertained upon mathematical principles with just as much certainty as if the surveyor's chain had been stretched along it. The testimony of the surveyors who were examined as witnesses in this case, we do not regard as at all sufficient to rebut the presumption that the commissioners did their duty, or as even tending to show that these commissioners, though required to lay out a square, proceeded to lay out a very different and very irregular figure. In fact, their testimony after all is mere speculation, and furnishes no facts which can constitute evidence. They do not say that there are any marks or other indications that the surveyor ran a line along the east bank of the river. Indeed, we see no reason why the surveyor should have run any such line except for the purpose of ascertaining the area embraced within the lines, as contended for by the relator, and as the map does not purport even to show such area, we cannot suppose that any such line was ever run.

But even if we should assume that the commissioners, though required by the act to lay off a tract of land two miles square, failed to comply with this requirement, and laid off a tract of less area, and totally different shape, because of the irregular course

of the Congaree River, which they designed as the western boundary, and if the map filed by them in the office of the secretary of State should be regarded as designating the Congaree River as the western boundary, we do not think it by any means follows that the *east bank* of said river would constitute such boundary. On the contrary, our opinion is that the boundary would be the centre of the stream. This view is, we think, fully supported by the authorities cited by the appellants' counsel in his argument, and it is only necessary to refer to some of them in support of our conclusion. In *Noble v. Cunningham* (*McMull. Eq.*, 289), the rule that where a stream, not navigable, is laid down as the boundary of a tract of land, the tract will extend to the centre of the stream, unless there is evidence on the face of the conveyance or plat of an intention to exclude the stream and confine the boundary to its edge, was recognized and applied; and in that case it was held that: "No intention to exclude it can reasonably be inferred from the fact that the corners were marked on trees growing on the bank. The corners were marked on the bank of necessity. No corners could be put in the river. The surveyor stopped at the river because he could go no further; and being arrested by the necessity of the case, there is reason to conclude that the line was stopped at the river only because it could not be extended to a corner in the stream. The river is laid down as an open line, from corner to corner, which, in fact, makes it a boundary and carries the line to the thread of the stream, or centre of the boundary." In *McCullough v. Wall* (*5 Rich.*, 68; *53 A. D.*, 715), the same doctrine was recognized, as well as in the case of *Shands v. Triplet* (*5 Rich. Eq.*, 76), at least above the falls, which in their natural state obstructed the serviceable use of the river for the purposes of navigation.

It is true that this proprietary right to the centre of such streams is subject to the right of the public to use such streams for transportation as a highway, where such streams are in fact, though not technically, navigable, or may be made so by the removal of obstructions. But this right of easement in the public does not deprive the riparian proprietor of his title to the soil covered by the stream, as far as the centre of the stream. It is an entire mistake to suppose that the case of *Boatwright v. Book-*

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*man* (*Rice*, 447) has decided that the Congaree River is such a navigable river as would take it out of the operation of the rule above stated. The case itself shows that no opinion was expressed as to that point, and the comments upon that case, in the subsequent case of *McCullough v. Wall*, *supra*, distinctly negative any such supposition.

It is argued, however, that while this may be the rule in regard to grants and conveyances of land, that it does not apply where, as in this case, land is taken, under the right of eminent domain, for some public purpose. We are unable to perceive any valid reason why there should be such a distinction. The object of the rule was to designate with certainty the limits of the land granted or conveyed, and we do not see why such certainty is not as much desirable where a tract of land is appropriated, under the right of eminent domain, to public uses, and why, therefore, the same mode of obtaining it may not be resorted to. In addition to this, the terms of the act manifestly imply that the land appropriated is to be purchased from those who were then the owners, and this involves the idea of bargain and sale—conveyance. And after this lapse of time, especially in view of the loss of the records, the court would, if necessary, presume that the land was actually conveyed by the original proprietors to the commissioners for the public uses designated. If this rule cannot be applied in this case, then the result would be that the original proprietors of the land bounded by and adjacent to the river, or their heirs, would still be the owners of the soil lying between the eastern edge of the river and the centre of the stream; for as riparian proprietors they originally owned to the centre of the stream; and if it did not pass to the commissioners, it still remains in them or their heirs. Such a conclusion the court would be very slow to adopt without the most abundant testimony to support it.

Again, it is urged that the incorporated territory only embraces that which was actually surveyed and laid out by the commissioners, and therefore, until it is shown that the commissioners did actually survey and lay out the land to the centre of the stream, the same cannot be regarded as included within the incorporated territory. To say nothing of the fact that, under the principles above stated, if the commissioners did lay down the

Congaree River as the western boundary, they must be regarded as having embraced within their survey so much of the soil covered by water as lay between the eastern edge of the stream and its centre, though they did not, by reason of the physical difficulties, actually run the line in the centre of the stream, it seems to us that this position is based upon a misconception of the terms of the act under which the commissioners acted. It will be observed that the language of the act is, *not* that the land *laid off by the commissioners* shall be appropriated by the public to the establishment of the town; but, on the contrary, the act, after describing where the land is to be laid off, and fixing its dimensions and shape, proceeds to declare—"which said land shall be, and the same is hereby declared to be, vested in the said commissioners, and their lawful successors, for the use of this State." So that the territory incorporated as a town was, not the land actually surveyed and laid off by the commissioners, but was the land which the act directed them to lay off.

The case of *Jones v. Soulard* (24 How. [U. S. Rep.], 41), is very much like the case under consideration. There the question was as to the eastern boundary of the city of St. Louis. It appeared that the town of St. Louis was incorporated in 1809, and the boundaries laid down in the charter are as follows: "Beginning at Antoine Roy's mill on the bank of the Mississippi, thence running sixty arpens west, thence south on said line of sixty arpens in the rear, until the same comes to the Barrien Denoyer; thence due south to the Sugar Loaf; thence due east to the Mississippi; from thence by the Mississippi to the place first mentioned." The controversy was as to whether the city limits extended to the centre of the river or should be confined to the west bank; and notwithstanding the beginning corner was located "*on the bank of the Mississippi*" (manifestly the west bank) and notwithstanding the closing line was laid down "*by the Mississippi*" the court held, upon the principles above stated, that the eastern line of the city was the centre of the river. The case fully recognizes the doctrine that all grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer title on the grantee to the thread of the stream, and that the size of the river does not alter the rule. It

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will also be observed that the Supreme Court of the United States applied this rule as to grants of land to the charter of an incorporated town. And, as is said in 1 *Dill. Mun. Corp.*, section 125, note: "The same construction that is given to grants is given to statutes which prescribe the boundary of incorporated territories. Thus where a stream not navigable is made the boundary, the centre of the stream is the true line."

The Circuit Judge seems to have rested his conclusion, in part at least, upon long acquiescence by the city of Columbia in the western boundary as claimed by the relator. Now, while it is true that where the boundaries are vague and indefinite, the practical interpretation which had been given by the citizens of the disputed territory, in exercising municipal privileges, such as voting, &c., may be adopted by the court, and that boundaries may be defined by long use, confirmed by legislative recognition, we are unable to see how these principles can be applied to this case. In the first place, we are unable to discover the slightest evidence in this case of any acquiescence on the part of the city of Columbia in the location of the western boundary as claimed by the relator. It does not appear whether the city authorities ever before attempted to levy a tax on the bridge, or ever attempted to exercise, or declined to exercise, any municipal authority beyond the eastern bank of the river; and even if they had omitted for many years to levy any tax on the bridge, that would not of itself justify the inference that the city authorities recognized it as being outside of the city limits, for certainly the bare fact that a certain piece of property has for many years escaped taxation, is not sufficient to show that it is not within the city boundaries. Nor do we see that the act chartering the bridge company or any of the other acts referred to, show any legislative recognition of the eastern bank of the river as the western boundary of the city. The testimony of Mr. Perry certainly does not show any acquiescence on the part of the city. At most, it only shows that an island in the river, the precise location of which is not ascertained, has not since 1879 been taxed by the city; but whether because it was not regarded as embraced within the city limits, or for what reason, the testimony does not inform us. But, in the second place, this doctrine of



acquiescence only applies in cases where the boundaries are vague and indefinite, and can have no application where the boundaries are well defined, or are capable of being designated with mathematical certainty, as in the present case.

It seems to us, therefore, that the Circuit Judge erred in holding that the limits of the city of Columbia did not extend beyond the eastern bank of the Congaree River, and hence that relator's bridge not being, either in whole or in part, within the city limits, was not liable to taxation by the city; and consequently that he erred in ordering a writ of prohibition to issue prohibiting the collection of the tax imposed by the city on said bridge.

The judgment of this court is, that the judgment and order appealed from be reversed, and that the petition of the relator be dismissed.

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WALKER & TRENHOLM v. LANEY.

1. The judge may state to the jury the testimony of the witnesses, or the substance thereof, but he must not intimate his opinion upon the force and effect of the testimony.
2. Where an assignment was denied in the answer but not in testimony, and was proved by the plaintiffs, the Circuit Judge did not err in charging the jury that there was before them no denial of the assignment.
3. An account may be proved not only by the book of original entry, but also by the personal knowledge of a witness or the admissions of the debtor.
4. The statute of limitations is properly pleaded only by alleging the facts which would make the statute applicable. Where the plea was "the account is barred by the statute of limitations," the Circuit Judge did not err in instructing the jury to disregard this defence.

• Before COTHRAN, J., Chesterfield, September, 1886.

The opinion states the case.

*Messrs. Prince & Rankin*, for appellant.

No counsel contra.

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July 9, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiffs, respondents, brought the action below as assignees of an open account alleged to have been contracted by defendant with M. A. Wells for goods, wares, and merchandise, between the years 1872 and 1877, amounting in value to the sum of \$374.53, and by the said Wells assigned to the plaintiffs. The action was commenced January 10, 1884, the plaintiffs alleging in their complaint the contracting of the account, the consideration, that it was duly assigned to them, that during the fall of 1881, the defendant, appellant, in a written note to E. M. Wells, agent of M. A. Wells, the then owner and holder of the account, acknowledged and promised to pay it. The appellant denied in his answer each and every allegation in the complaint, and for a further defence he said: "The account is barred by the statute of limitations." The case resulted in a verdict for the plaintiff for \$374.50.

The defendant's appeal is based upon the following exceptions:

"1st. His honor erred in charging the jury that Mr. E. M. Wells, the agent of M. A. Wells, 'had testified that the items of the account are true,' when the fact was that it was in evidence that two of the books were burnt or could not be found, four or five of them were found and statement only in one book was referred to as being correct.

"2nd. His honor erred in charging the jury that the same witness testified that 'some time in 1881, I think, he had a conversation with the defendant Laney in the back of room of his store, and went over the account item by item and acknowledged that the account was correct.'

"3rd. His honor erred in charging that the assignment to the plaintiff was not denied by the defendant, when the answer does expressly deny it.

"4th. The account was not proved as required by the rules of evidence.

"5th. His honor erred in holding that the bar of the statute of limitations was not well pleaded, and in instructing the jury to disregard it.

"6th. The verdict was contrary to and without evidence to sustain it."

Exceptions one, two, and three, we suppose, were intended to raise the question that his honor charged upon the facts contrary to the provisions of the constitution on that subject. This constitutional inhibition does not prevent the trial judge from stating to the jury what the witnesses testified to; on the contrary, it may be very proper in many cases for him to read the testimony in full to the jury, and to so arrange it as that its application may be seen. All this, however, is left very much to his discretion. What he is forbidden to do is, that his opinion as to the force and effect of the testimony must not go to the jury. There must be no intimation from him, either accidental or intentional, as to what disputed facts have been proved.

Now, it seems to us that exceptions one and two show on their face, that his honor below did not violate this rule. He simply stated that Mr. E. M. Wells had testified in a certain way, to wit: "That he had testified that the items of the account were true." "That some time in 1881, he had had a conversation with the defendant Laney in the back room of his store, and went over the account item by item, and he acknowledged the account was correct." This was not giving to the jury any opinion of his own as to these facts; it was only stating what the witness had said. It may be that this statement was not in the precise language of the witness, but yet it was substantially what he had sworn. The difference between the "counting-room" of the witness, where he said the conversation took place, and the "back room of the store," mentioned by the judge was immaterial. The important matter was the conversation.

As to the third exception, we suppose his honor meant that there was no denial of the assignment in defendant's evidence—no evidence directed to that point. Of course, the answer could not be regarded as testimony.

The 4th exception complains that the account was not proved according to the rules of evidence. This is a very general exception, no special rule being pointed out, which was violated or disregarded. It is true, as stated in the argument of counsel, an account may be, and must be, in the absence of other legal testimony, proved by the introduction of the original entries, but still it may be proved by a witness who was present and saw the

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account contracted, or by the admissions of the party charged. We think in this case that there were admissions of the defendant, sufficient to go to the jury, and the verdict having been rendered in favor of the plaintiff, on a question of fact like this, it cannot be disturbed by this court upon a general exception like the one under consideration.

The 5th exception questions the ruling of the judge on the subject of the plea of the statute of limitations. The defendant, at the conclusion of his answer, stated that "for a further defence the account is barred by the statute of limitations." The judge held this to be an insufficient mode of interposing the bar of this statute, and we think, according to strict law, he was correct. The pleadings should contain the facts upon which the issue between the parties is made up, alleged on the one side and denied on the other, and not simply conclusions of law, and where the defence rests upon facts as matter of avoidance, they should be averred. The facts upon which the statute of limitations may be interposed as a defence is, that the promise was not made within six years. Here this fact was not alleged, but the defendant simply claimed the benefit of the statute, without stating any ground upon which to base his claim. This was a defect in substance rather than in form. It was pleading a conclusion of law instead of averring facts, upon which an issue might be raised, to be submitted to the jury.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

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BROWN v. BROWN.

A judgment by default being vacated and defendant permitted to answer upon payment of the expenses incurred by plaintiff in coming to court, to be assessed by the clerk, the plaintiff must establish such expenses before the defendant can pay them; and, to that end, it was ordered by this court that plaintiff should prove such disbursements before the next term of the Circuit Court, and that upon plaintiff's failure so to do, or upon their payment, the answer be allowed to come in and the cause stand for trial.

Before COTHRAN, J., Barnwell, April, 1886.

This was an action by Mary Ann Brown against James S. Brown. The appeal came to this court upon exceptions by the plaintiff to an order directing the cause to stand for trial.

*Mr. James E. Davis*, for appellant.

*Messrs. Skinner & Williams*, contra.

July 9, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff, appellant, in 1885, obtained a verdict against the defendant by default, in an action to recover the value of a horse and buggy. Afterwards, at the November term of the court in 1885, the defendant, respondent, on motion set aside said verdict, and was allowed to answer, upon the payment of the actual costs of the plaintiff incurred "in coming to court to prove her case, the same to be assessed by the clerk, and that the case be docketed on the issue docket and stand for trial." The defendant answered with a general denial, without, however, having paid the costs above; and upon this ground the answer was immediately returned, plaintiff claiming that defendant had not complied with the order of Judge Pressley as to said costs. At the April term of the court in 1886, the case was found upon calendar 1, and the facts above being presented, with the statement that there had been no adjustment of the costs by the clerk, or if so, that the defendant had received no notice thereof, nor of any intention to have the same assessed, his honor, Judge Cothran, ordered the case to stand for trial, notwithstanding the costs had not been paid.

The 63d rule of the Circuit Court allows a party, where a motion of his has been granted generally, upon the payment of costs, twenty days within which to comply, but where the costs are to be adjusted, he is then allowed fifteen days only after said adjustment. Here, if the order of Judge Pressley is to be regarded as a general order, taking effect from its date, then the twenty days had elapsed without the costs being paid, and the defendant, in that view of the case, would have had no right to put

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in his answer under Judge Pressley's order. But the costs required to be paid were not the costs specified in the fee bill, and of which the defendant would have been bound to take notice. On the contrary, they were special costs, to wit, as styled in the order "actual costs of the plaintiff in attending court to prove her case," and which the judge ordered should be assessed by the clerk, and which if they had been assessed, the defendant, under the 63d rule, *supra*, would have had fifteen days from the date of the assessment to pay. The clerk, however, made no assessment, and the defendant filed his answer.

We do not think that the case should have been tried without the payment of the costs ordered to be paid. Nor do we think that the defendant should lose his right to defend under the circumstances. He had no means of knowing the amount of the costs before assessment by the clerk. This assessment depended upon the plaintiff appearing before the clerk and giving the necessary information to him, inasmuch as the costs ordered to be paid were the actual expenses incurred by her, of which she alone had knowledge. We do not see how the defendant could have compelled her to appear and furnish this information. We think, under all the circumstances, it was erroneous to order the case to stand for trial without a compliance with the order of Judge Pressley, and that, therefore, the order of Judge Cothran should be vacated, with leave on the part of the plaintiff to establish her actual costs before the next term of the Circuit Court for Barnwell County, as specified in said previous order, and upon its payment by the defendant, or upon the plaintiff failing to establish the same as suggested, that the case be set down for trial, the defendant's answer being allowed to come in upon said payment or said failure of plaintiff.

It is the judgment of this court that the order of the Circuit Court be reversed, and the case be remanded under this opinion above.

## DARGAN v. WEST.

1. Where the record fails to show that any objection was raised or considered on Circuit as to the sufficiency of a notice of appeal to that court from the judgment of a trial justice, the insufficiency of such notice cannot properly be raised on appeal to this court.
2. An appeal from a trial justice's court was taken on the ground "of the manifest injustice done this defendant, and those set out in writing, made on the motion for a new trial before the trial justice, and the affidavit there used in behalf of said motion and all the evidence and records in the case." *Held*, that this was a sufficient statement of the grounds of appeal; for the other grounds therein referred to, though not incorporated therein, must be assumed to have been before the Circuit Judge in the report of the trial justice.

Before KERSHAW, J., Greenville, July, 1886.

The case is fully stated in the opinion of the court.

*Mr. Adam C. Welborn*, for appellant.

*Mr. W. D. Mayfield*, contra.

July 9, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This case was originally commenced in a trial justice's court, where judgment was rendered in favor of the plaintiff against the defendant, Williams, alone, who appealed therefrom to the Court of Common Pleas, "on the ground of the manifest injustice done this defendant, and those set out in writing, made on the motion for a new trial before the trial justice and the affidavits there used in behalf of said motion, and all the evidence and records in the case." That appeal was heard by Judge Kershaw, and he granted an order sustaining the appeal and remanding the case to the trial justice for a new trial. The present appeal is from the order of Judge Kershaw, and is based upon the following ground: "Because the court erred in refusing to dismiss the appeal from, and affirm the judgment of, the trial justice on the ground that the notice of appeal failed to state the grounds upon which the appeal was founded."

It seems to us that the insuperable obstacle in the way of the

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present appellant is the fact that it nowhere appears in the record that any objection was made to the sufficiency of the statement of the grounds of appeal from the judgment of the trial justice, or to the absence of any statement of such grounds, when the appeal was heard in the Court of Common Pleas. It does not appear that Judge Kershaw either made, or was called on to make, any ruling as to the sufficiency of such grounds of appeal. On the contrary, we would infer from the very meagre statements in the record that the appeal was heard upon the merits, and that no motion to dismiss the appeal upon the ground of the absence or insufficiency of the statement of the grounds of appeal was submitted. At all events, in the absence of any showing that some ruling was made or refused upon request by the Circuit Court upon the point now raised, it is quite clear that there is nothing before us properly for review. In cases of this kind our jurisdiction is limited to a correction of errors of law committed by the Circuit Court, and until it appears that some ruling on the point presented has been made by the Circuit Court, or refused upon request, we, of course, are unable to determine whether any error was committed. This principle has been so repeatedly announced that it is not necessary to say more. *Railroad Commissioners v. Railroad Company*, 22 S. C., 220; *Dulany & Co. v. Elford & Dargan*, *Ibid.*, 304; *State v. Haines*, 23 *Id.*, 170; and *Hyrne v. Erwin*, *Ibid.*, 226.

But as we are always averse to deciding a case upon what would even seem to be a technical point, we will, *ex gratia*, consider the question presented by the appeal. Assuming, then, that a motion to dismiss the appeal from the trial justice, upon the absence or insufficiency of the statement of the grounds of appeal, had been made and refused, or that the question was otherwise properly made and decided against the view of the present appellant, we do not see that there was any error in such decision. It is true that under section 359 of the Code, the appellant in the judgment rendered by the trial justice is required, within a prescribed time, to serve his notice of appeal, "stating the grounds upon which the appeal is founded," but we do not find that the manner in which such statement shall be made is anywhere prescribed either by statute or rule of court in that tribunal. And when we



remember that one of the prime objects of the code was to dispense with mere form whenever practicable, especially in the inferior courts, as to which it is specially directed (*Code*, section 368) that: "Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits," we would not lend a ready ear to an objection based upon a mere matter of form.

In this case such is really the character of the objection to the grounds of appeal from the judgment of the trial justice. For it will be observed that the ground stated is not merely "the manifest injustice" done the defendant, but also "those set out in writing made on the motion for a new trial before the trial justice." This was the same thing as if the grounds of the motion for a new trial had been incorporated in the grounds of appeal. What the grounds of the motion for a new trial were, the "Case" as prepared for argument here does not show, and we certainly cannot assume, in the absence of any showing to that effect, which it is incumbent on the appellant to make, that the statement therein was insufficient. But we must assume that the grounds of the motion for a new trial, which were referred to in the grounds of appeal to the Circuit Court, and adopted as a part thereof, were before Judge Kershaw, because by sections 358 and 362 it is made the duty of the trial justice to make a return to the Circuit Court of "the testimony, proceedings, and judgment," which, of course, would include the grounds of the motion for a new trial, and section 367 provides that the appeal shall be heard upon these papers, and in the absence of any evidence to the contrary, we must presume that the trial justice performed this duty. The fact that the grounds of the motion for a new trial were not actually incorporated into the grounds of appeal, but simply referred to and adopted as a part of the grounds of appeal, can make no difference—certainly not in appeals from the judgment of a trial justice. For even in appeals to this court such a practice prevailed and was recognized, until it was forbidden by a recent rule of this court. But there is no such rule applicable to appeals from a trial justice.

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The judgment of this court is, that the order appealed from be affirmed.

*EX PARTE* CRAWFORD & SONS.

*IN RE* BROOKS v. ADAMS.

An executor brought his action for partition and settlement of the estate, and prayed that the share of A, one of the heirs, might be settled on his wife and children as permitted by the will. *Held*, that a judgment creditor of A was entitled to intervene by petition and be heard as to the disposition of A's interest.

Before ALDRICH, J., Richland, July, 1886.

The opinion states the case.

*Mr. E. C. Haynsworth*, for appellants.

*Mr. Allen J. Green*, contra.

July 11, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. Many years ago James H. Adams, sr., died, leaving a handsome estate and a large family. He disposed of his property by a will, of which John Hampden Brooks, a son-in-law, is now the sole qualified executor. After making certain specific bequests, he devised and bequeathed the remainder of his estate to his wife, Jane M. Adams, during her natural life, and then over to his "children," as follows :

"Item 12. On the death of my wife my will and desire is, that all of my estate, both real and personal, hereinbefore devised or bequeathed to her for life or widowhood, be equally divided amongst my children in fee simple, the child, or children, of any deceased child taking the share its or their parents would have been entitled to take if living. \* \* \*

"Item 14. On the final division of my estate after the death of my wife, I authorize and empower my executors, Warren Adams and J. H. Brooks, to make such settlement, or settle-

ments, of the shares of any one or more of my children as they may deem necessary to protect such shares from the bad management or improvidence of my children or my sons in law, such settlement always, however, in case of my sons, to be so drawn as to permit as full and free enjoyment of the property bequeathed to them and its income as may be consistent (under the then existing law) with the entire exemption and protection of such property from the debts, contracts, and liabilities of my said sons; and as to the shares of my daughters, the same to be settled to their sole and separate use, respectively, and to be free from the debts, contracts, or control of their respective husbands," &c.

In 1885 Mrs. Jane M. Adams, the life-tenant and executrix, died, and John Hampden Brooks having become, by substitution, executor in her place, instituted an action in the Court of Common Pleas for instruction, final partition, and settlement of the estate, in which it was suggested to the court, that for the reasons assigned by the testator in the 14th item of his will, and the power reserved therein to his executors, the share of the testator's son, James H. Adams, "should be protected from the debts, contracts, and liabilities of the said James H. Adams, and to that end that the said share should be settled exclusively upon the wife and children of the said James H. Adams upon such terms, trusts, and limitations as to this court shall seem necessary to carry the testator's intention, to provide against the bad management or improvidence of any of his children, into effect."

In the mean time, before the death of the life-tenant, the said James H. Adams, one of the sons of the testator, had contracted debts; upon one of which John A. Crawford and David M. Crawford, as survivors of D. Crawford & Sons, recovered in 1880 a judgment against him for \$630.91, besides interest and costs, and pending the aforesaid action for partition and settlement of the estate of Gov. Adams, filed the petition *in re*, alleging that the said James H. Adams, their judgment debtor, has no property subject to levy and sale under said judgment, except his undivided interest in his father's estate; that it would work a great injury to them and other creditors should the court allow the interest of the said James H. Adams in the estate of his father to be disposed of by decree in the cause, without pay-

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ment first being made of their judgment; and praying that they might become parties defendant in order that they may, by their answer, set up their judgment against the said James H. Adams as a lien upon his distributive share in his father's estate.

The application was made before Judge Aldrich, who dismissed the petition, and from his order the appeal comes to this court upon the grounds following: "I. Because his honor refused and dismissed the petition in which petitioners prayed that they be allowed to come in and defend said action as judgment creditors of James H. Adams, one of the parties defendant. II. Because his honor did not allow petitioners to file their petition in said cause and defend as to the interest of James H. Adams without being made formal parties thereto."

We do not consider that the appeal involves the merits of the case as to whether the petitioners, judgment creditors of James H. Adams, are entitled to have their judgment paid out of the share, about to be ascertained, of their debtor, James H. Adams, in the estate of his father; but simply whether they have an equity to be heard in the main cause before the division of the estate and a final decree is made in relation to the said share. If the creditors of James H. Adams have the right to be heard upon the subject, it must be at this time, for it will be too late after the court has made final disposition of his share. *Simmons v. Simmons*, *Harp. Eq.*, 255.

Mr. Pomeroy declares that "the fundamental doctrine of equity concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained, either for or against them, shall be made parties to the suit." 1 *Pom. Eq. Jur.*, section 114, and see his *Remedies*, section 375, in regard to the right of incumbrancers to intervene in cases of partition, &c. If the will of the testator had stopped at the end of the 12th clause, we suppose there could have been no doubt that the son, James H. Adams, would have taken a vested remainder (to be enjoyed after the death of his mother), in his share, at least, of the lands; and in that case, that the

judgment of the petitioners would have had a lien upon it, and might, even before division, have levied and sold the same. "A vested remainder in fee of land may be levied on and sold during the continuance of a life estate, and while the tenant for life is in possession." *Harrison v. Maxwell*, 2 Nott & McC., 347, 10 A. D., 610, and *Bonham v. Bishop*, 23 S. C., 104. It is true that this lien, if not enforced before partition, would not have been allowed to interfere with the rights of the parties to partition and divide the same among themselves. But by timely application to the court, the judgment or record creditors could have had their liens protected by an order for the payment to them of the defendant's share of the price of the lands divided or sold for division. *Burris v. Gooch*, 5 Rich., 1; *Gatewood v. Toomer*, 14 Rich. Eq., 144; *Garvin v. Garvin*, 1 S. C., 60; *Riley v. Gaines*, 14 Id., 454; and *Pendergrass v. Pendergrass*, 26 Id., 20.

In *Gatewood v. Toomer*, *supra*, Chief Justice Dunkin said: "In proceedings for the partition of the real estate of a deceased person among his heirs or devisees, it is the practice of the court, upon the suggestion of the personal representative, or of other persons interested as creditors, to take care that their rights are protected, and an order made for calling in creditors. And so, if a claim exists to the distributive portion of one of the heirs or devisees, it is not infrequent to entertain a petition in behalf of such claimant entitled in the cause, and a copy of such petition is required to be served upon the adverse party. That petitions of this character are sanctioned, see 3 Dan. Chan. Pl. & Pr., 1709." In *Garvin v. Garvin*, *supra*, Judge Willard said: "Where there is a claim by judgment or other record creditors, to the fund brought in either on petition or by rule, a question is made which may be brought before this court, provided the decree in relation thereto is, in its nature, final as to the matters embraced in it. That this is the usual and proper mode of bringing forward the demands of such creditors having a right to come into equity for satisfaction out of the fund is well settled. In *Simmons v. Simmons* (Harp. Eq., 256), a rule was moved in a particular suit by a judgment creditor of one of the distributees for payment out of the proceeds of sale. Although in that case

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the creditor did not intervene in time (the share of the distributee bound by the judgment having been paid over to him before demand made by his creditors). still no question was made as to the propriety of the mode of his intervention," &c. In *Raley v. Gaines*, *supra*, Judge McIver said: "Thus, while it is true that the judgment of the appellant was a lien upon the undivided interest of Gaines in the real estate of his deceased father, yet that lien was subordinate to the right of the other heirs to have partition made, and if, upon such partition, the whole of the land had been sold, or if it had been assigned to one or more of the other heirs, the lien of the judgment upon the lands would have been divested and transferred to the interest of Gaines in the proceeds of sale, or in the amount which those to whom the land had been assigned, were decreed to pay for equality of partition"—citing the authorities.

This being clearly settled, the only question is whether the matter is changed by anything contained in paragraph 14 of the will. That provision is very peculiar. In reference to the division to be made among "the children," after the falling in of the life estate, it delegates to the executors the power to make such settlement of the shares of his children (including James H. Adams, now an adult son under no legal disability) "as they may deem necessary" to protect such share from his bad management or improvidence; in such way, however, as "to permit as full and free enjoyment of the property as may be consistent with the entire exemption and protection of said property from his debts, contracts, liabilities," &c. It seems to us that the questions raised under this paragraph are neither in the ordinary line, nor entirely free from difficulty. The judge does not give his reasons for dismissing the petition. We are not so clear on the subject as to need no further argument. Without in the least degree intimating an opinion upon the merits as to the effect of this provision of the will, we think that in accordance with the principles and practice of the Court of Equity the petition should not have been dismissed, but entertained as somewhat in the nature of a cross-action, and the judgment creditors allowed to be heard as to their rights in the premises.

The judgment of this court is, that the order of the Circuit

Court dismissing the petition *in re* be reversed; that the same be filed; and the petitioners, judgment creditors of James H. Adams, thus allowed to intervene in the principal cause, may be heard therein upon the subject of their rights.

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AMERICAN BUTTON-HOLE, OVERSEAMING, AND SEWING  
MACHINE COMPANY v. HILL.

1. An answer is frivolous when it fails to deny any of the allegations of the complaint or to state any new matter by way of defence.
2. The fact of incorporation pertains to the right to sue, and therefore where a plaintiff corporation alleged its corporate existence and defendant answered such allegation by a denial of knowledge or information sufficient to form a belief, the plaintiff's corporate existence or capacity to sue is not in issue.
3. Plaintiff alleged the execution and delivery to it by defendant of four notes, which were set out in full. Defendant admitted the execution of certain notes, but said he did not know the date, amount, or terms of said notes, and he denied "each and every allegation of said complaint not hereinbefore admitted or denied." *Held*, that the answer was not frivolous, but raised an issue for the jury.

Before ALDRICH, J., Spartanburg, March, 1887.

The opinion states the case.

*Mr. Chas. P. Barrett*, for appellant.

*Mr. Ralph K. Carson*, contra.

July 12, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. The plaintiff, claiming to be a body corporate under the laws of the State of Pennsylvania, sued the defendant on four notes, each for \$97.50, alleging that they were executed by him and payable to the order of "American Button Hole, Overseaming, and Sewing Machine Company." Copies of the notes were set out in the complaint. The defendant answered as follows: "1. That he has no knowledge or information sufficient to form a belief as to the incorporation of

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said 'American Button Hole, Overseaming, and Sewing Machine Company.' 2. That the defendant admits that he executed and delivered certain notes, payable to the alleged American Button Hole, Overseaming, and Sewing Machine Company, but does not know the date, amount, or terms of said notes. 3. That defendant admits that he has paid no part of these notes. 4. That defendant denies each and every allegation of said complaint not heretofore admitted or denied." The plaintiff, after due notice, moved an order overruling the answer as frivolous, and for judgment thereon. Judge Aldrich granted the motion and gave the plaintiff judgment on the notes. From this order the defendant appeals, alleging error for the reason that the material averments of the complaint were denied in the answer.

Section 170 of the Code provides as follows: "The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief, &c. 2. A statement of any new matter constituting a defence or counter-claim," &c. Section 268 declares that, "If a demurrer, answer, or reply be frivolous, the party prejudiced thereby may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly." An answer may therefore be said to be frivolous when it fails to deny any of the allegations of the complaint, or to state any new matter by way of defence. It appears from a mere glance that the answer in this case contained no new matter and the question is whether it denied a material allegation of the complaint so as to make an issue. "In order to make the answer frivolous the objection must extend to and embrace the whole pleading objected to; so that nothing is left of the pleading that can entitle the party to a trial." *Tharin v. Seabrook*, 6 S. C., 118.

Paragraph one of the answer makes no legal and proper denial. True, it states that the defendant "has no knowledge or information sufficient to form a belief" as to the incorporation of the said "American Button Hole, Overseaming, and Sewing Machine Company," but as the fact of incorporation pertained to the right to sue, this court, in the case of the *Steamship Company v.*



*Rodgers* (21 S. C., 27), has held that, "where a plaintiff corporation alleged its corporate existence, and defendant answered such allegation by a denial of knowledge or information sufficient to form a belief, the plaintiff's corporate existence or capacity to sue is not in issue."

Paragraphs two and three admit that he (defendant) "executed and delivered certain notes to the alleged 'American Button Hole, Overseaming, and Sewing Machine Company,' but does not know the date, amount, or terms of said notes." As copies of the notes sued on were attached to the complaint, we confess this looks very much like an intentional evasion; but still we cannot say that it was an admission of the identical four notes sued on. It was certainly not a denial that he signed these notes and made no issue. But the fourth paragraph states "that the defendant denies each and every allegation of said complaint not hereinbefore admitted or denied." It seems to us that this was in effect a denial that he had executed the identical notes sued on. We have seen that none of the other paragraphs had properly denied any of the material allegations, and that there was no unequivocal admission of the identical notes sued on, but of some notes, &c. See *Kennedy v. Moore*, 17 S. C., 467; *Savings Bank v. Strother*, 22 *Id.*, 557. We cannot resist the conclusion that the last paragraph of the answer was a general denial of the allegations of the complaint, and made an issue for the jury.

The judgment of this court is, that the judgment of the Circuit Court be reversed.

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SMITH v. SMITH.

A debt represented by a note which was made void because altered in a material part, was also secured by a mortgage which recited the note. Held, that the mortgage was not avoided, but was a valid security and could be enforced. *Plyler v. Elliott*, 19 S. C., 264, approved and followed.

Before FRASER, J., Greenville, April, 1887.

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The note of Spillars is set forth in the opinion. So much of the mortgage as recited the debt was as follows :

"Whereas I, the said William C. Yeargin, in and by one note, certain bond or obligation, bearing date the 23rd day of December, A. D. 1882, stand firmly held and bound unto A. Spillars, of said county and State aforesaid, in the penal sum of three hundred dollars, conditioned for the payment of the full and just sum of three hundred dollars of same date herewith, with interest from this date thereof annually, as in and by the said bond and condition thereof, reference being thereunto had, will more fully appear.

"Now, know all men that I, the said Wm. C. Yeargin, in consideration of the said debt and sum of money aforesaid, and for the better securing the payment thereof to the said A. Spillars according the condition of the said bond, and also in consideration," &c.

Other matters are stated in the opinion of this court.

*Messrs. Westmoreland & Dorroh*, for appellant.

*Mr. A. Blythe*, contra.

July 12, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. Baylis L. Smith, as the administrator of William C. Yeargin, deceased, instituted this action for the purpose of having lands of the intestate sold in aid of the personalty in paying debts and for partition. The heirs at law of the intestate were made parties, and also one Alexander Spillars, who held a mortgage of the lands of the intestate. An order was passed calling in the creditors to present and prove their demands before the master, S. J. Douthit, Esq. Among the creditors who presented demands was the said Alexander Spillars, who presented and proved a note as follows :

"\$300. One day after date I promise to pay A. Spillars or order three hundred dollars for value received, *with ten per cent. per annum.*<sup>1</sup>

<sup>1</sup>The words in italics were erased when the note was produced at the trial.—REPORTER.

"This 23rd day of December, 1882. (Signed) W. C. Yeargin, [L.S.]"

Endorsed: "October 27, 1883. Received interest in full on the within to December 23rd, 1884. December 1, 1884. Received interest in full on the within to December 23rd, 1885."

He also proved a mortgage of 140 acres of land, executed to him by the said intestate, Yeargin, to secure the same debt. It was admitted that the words, "*with ten per cent. per annum*" were put in the note by the directions of Mr. Spillars after the death of the intestate, without the knowledge or consent of the plaintiff (his administrator), and were erased after the suit was commenced, or crossed out by said Spillars. The defendant (Spillars) offered to prove by parol testimony that the agreement between him and the intestate, at the time and before the execution of the note, was that the intestate was to pay interest at the rate of ten per cent. per annum, and that it was simply an omission on the part of the party who drew the note, that it was not drawn in that way; and that neither discovered that it was not so drawn until the first interest was paid thereon. The testimony was excluded on the ground that parol testimony cannot be introduced to alter or vary the written instrument. The master, therefore, held that the words as to the interest added to the note by the direction of Spillars, rendered it void.

His report then proceeds: "The next question, then, to be considered is, the note being void, can the mortgage be established as a valid and subsisting claim independent of the note? Both parties cite and rely upon the same authority (*Plyler v. Elliott*, 19 S. C.), the plaintiff contending that the difference in this case from that is, that the mortgage there does not refer expressly to the note, while here it does, and therefore the mortgage cannot be separated from the note so as to stand as a valid claim of itself, as it would be impossible to establish the mortgage without referring to the note. After a careful examination of the case referred to, the master is unable to distinguish any material difference between it and the one under consideration, for it seems to him that the doctrine there intended to be enunciated is, that both the bond and mortgage are evidences and securities for the same debt, and although one may be rendered void, it does not

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take away the right to enforce the other. The mortgage in question certainly furnishes enough evidence independent of the note to establish the amount due thereon, for it recites that the condition of the note is 'for the payment of the full and just sum of \$300, of same date herewith,' &c. The master, therefore, finds that the mortgage in itself is a valid claim against the estate of the intestate herein," &c.

Upon exceptions to this report the cause came on to be heard by Judge Fraser, who confirmed the report and made it the judgment of the court. From this order the plaintiff (administrator) appeals to this court upon the grounds: "1. Because his honor erred in adjudging that the mortgage in question was a valid subsisting security, irrespective of the note it was given to secure. 2. Because his honor erred in adjudging that said mortgage furnished evidence sufficient, independent of said note, to establish the amount due thereon. 3. Because his honor erred in not adjudging that said note was the original contract and primary evidence of the debt, as shown by reference thereto in the conveying part of said mortgage, and that the invalidation of said note destroyed the validity of said mortgage."

We agree with the master and Circuit Judge that this case is concluded by that of *Plyler v. Elliott*, 19 S. C., 264. We do not deem it necessary to add anything to what is said in that case, or to reopen the argument; but simply to make one or two observations. It is certainly a mistake to consider the note as the debt itself, for all agree that even after the note is barred, a mortgage given to secure the same debt may be enforced. *Nichols v. Briggs*, 18 S. C., 484. But there seems to be an idea that there must of necessity be a difference when the note is made void by an alteration—that in such case, the act being fraudulent reaches beyond the security altered, and as a sort of penalty avoids the debt itself and all other securities. The rule as to the alteration of written securities, as announced by Mr. Greenleaf, is that, "written instruments which are altered in the legal sense of that term, are thereby made void"—that is, the instrument altered is made void—nothing is said as to the effect on the debt itself or other securities.

*Gillett v. Powell*, *Speer's Eq.*, 144, is our leading case on the

subject, and it is suggested that, though a case of alteration, the alteration there was "innocent," and therefore the punishment of avoiding the debt was not applied. I do not clearly see how it can be assumed that the alteration in that case was "innocent." In the report of the case Chancellor Harper says: "At the sale by the administrator *de bonis non*, James Higginbotham became the purchaser of slaves to the amount of \$2,337.75. He gave his bond for the amount, and on the same day executed a mortgage of the slaves, conditioned to be void on the payment of \$2,-337.75. \* \* \* On the production of the bond it was found to have been altered, so as to be conditioned for double the amount that was actually intended to be secured. The commissioner decided correctly that the bond was void for the alteration." And in delivering the judgment of the then Appeal Court in Equity, Chancellor Dunkin said: "The court has no disposition to call in question the decision of *Mills v. Starr*, 2 *Bail.*, 359. If Powell had no demand at law but on the bond, and he had lost that by his own fault or folly in altering the condition, he would be entitled to no aid from the court (Equity). But we can go no further. If, as illustrated by the Chancellor (Harper), he had taken another bond with a surety instead of the mortgage, this alteration of the original bond would not prevent his recovery at law on that which had been taken as collateral security, and this court (Equity) would not interfere but on payment of the amount really due." Besides, *Gillett v. Powell* is generally regarded in and out of the State, as a leading case, and is cited as one in which "the bond was fraudulently altered and made void." See *Herman on Mortgages*, section 293 and note. If, as argued, the alteration in that case was not fraudulent, for the reason that it "worked no injury to the maker," the same assuredly may be said in this case.

The judgment of the court is, that the judgment of the Circuit Court be affirmed.

MR. CHIEF JUSTICE SIMPSON concurred.

MR. JUSTICE McIVER. Yielding to the authority of *Plyler v. Elliott*, I concur.

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## DIAL v. GARY AND TAPPAN.

1. A decree final on the issues having been rendered in a cause, the succeeding judge has no power to adjudicate any of the issues; he can only pass the administrative orders necessary to carry out such decree.
2. No question having been made in the pleadings or evidence as to the order in which the mortgaged property should be subjected to the payment of the mortgage debt, and no such point considered by the Circuit Judge in his decree of foreclosure, a succeeding judge, in his order directing a sale of the property, cannot adjudicate thereon.
3. Two parties, G. and T., indebted by note for \$3,000, gave a mortgage on a town lot held jointly by them, reciting their indebtedness to be a joint penal bond to secure \$2,000, and T. gave a mortgage on a town lot owned by him, reciting his indebtedness to be a penal bond to secure \$1,000, but the real indebtedness was the note for \$3,000, no such bonds being in existence—and this was the claim made in the complaint. *Held*, that under this mortgage the joint property was liable only for the payment of \$2,000 and interest, and the lot of T. was liable only for the payment of \$1,000 and interest.
4. *It seems* that a mortgage cannot be foreclosed for an amount exceeding the penalty of the bond secured thereby.
5. In action for foreclosure, can judgment be rendered for the full amount of the mortgage debt and leave be given to issue execution therefor, before sale has been made and deficiency reported?
6. The judgment of this court having been more comprehensive than was intended, a petition for rehearing was granted.

Before PRESSLEY, J., Richland, November, 1886.

The case is sufficiently stated in the opinion of this court for a full understanding of the points decided.

*Messrs. Clark & Muller*, for appellants, contended that Judge Pressley's duties were only administrative (17 S. C., 339), and that he had misconstrued Judge Cothran's decree. Further, that plaintiff could not recover beyond the penalty of the bond. 10 Rich. Eq., 149; *McMull. Eq.*, 105, 157, 198.

*Messrs. Lyles & Haynsworth*, contra.

July 13, 1887. The opinion of the court was delivered by MR. JUSTICE MCIVER. The litigation between these parties

has been brought before this court upon several previous occasions, as appears in 14 *S. C. Rep.*, 573, 584; 20 *Id.*, 167, and 24 *Id.*, 572, to which reference may be had for a more full statement of the facts than it is deemed necessary to make on the present occasion.

Judge Cothran, by his decree of January 14, 1885, subsequently affirmed by this court, determined that the two mortgages—the one given by Gary and Tappan on the Gervais street property, nominally to secure the payment of a bond in the penal sum of \$4,000, conditioned for the payment of \$2,000, and the other given by Henry L. Tappan on the Blanding street property, nominally to secure the payment of a bond in the penal sum of \$2,000, conditioned for the payment of \$1,000—were both really given to secure the payment of the debt represented by the joint note of Gary and Tappan for three thousand dollars, but not having been furnished with the papers necessary for the purpose, he was unable to formulate a proper judgment in the case, and he therefore simply ordered and adjudged: “That the plaintiff herein have the relief demanded in his complaint, and that his counsel have leave to move before the Judge of the Fifth Circuit, or the judge in turn presiding for the County of Richland, for such formal judgment as may be necessary to effectuate this purpose.”

Judge Pressley being the judge in turn presiding for the County of Richland, application was made to him for such formal judgment. Upon this application the parties raised the question, “whether the Gervais street property is bound by the mortgage thereon for the whole of the said three thousand dollar note, or whether it is bound for only two thousand of the same.” Judge Pressley, after saying that: “On this question Judge Cothran has not specifically decreed. His decision is, that the mortgages on the Gervais street lot, and that on the Blanding street lot, were intended to secure said note,” and after stating that, for certain reasons, which need not here be repeated, he understands Judge Cothran’s decree to determine that the mortgages must be construed most favorably to the mortgagee, proceeds to decide as follows: “Considering, then, that the note in question was the joint note of the mortgagors, and that the Gervais street property was

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their joint property, whilst the Blanding street lot was the sole property of H. L. Tappan, I am led to the conclusion that the Gervais street mortgage was intended to be the first security for the whole of said note, and that the other mortgage was intended to secure the deficiency, if any, not exceeding one thousand dollars."

But recognizing the fact that "there may be doubt whether this be the correct meaning of Judge Cothran's decree," and with a view to avoid further delay, he renders judgment in favor of the plaintiff, and against the defendants, for the sum of \$5,171.42, the full amount of the three thousand dollar note, with leave to enter judgment and issue execution for the same forthwith. Then he renders judgment for the full amount of the second cause of action, as to which there was no contest, and orders that if the last mentioned amount be not paid by a day named that the Gervais street property be sold under the mortgage on it given to secure the payment of the second cause of action, subsequent to the mortgage first above referred to, and directs that the proceeds of the sale be applied in payment of the amount adjudged to be due on the second cause of action, together with the interest thereon and the costs of the case, and that the balance of the proceeds of the sale be held subject to the further order of the court.

From this judgment the defendants appeal upon the following grounds: 1. Because of error in holding that the mortgages must be construed most favorably to the mortgagee. 2. In holding that the Gervais street property was intended to be the first security for the entire debt. 3. In rendering judgment against the defendants for the entire amount of the three thousand dollar note, with leave to issue execution for the same forthwith.

It will be observed that Judge Pressley was simply called upon to render the formal judgment authorized by Judge Cothran's decree, or as he himself expresses it: "My sole duty is to make such order as may execute his decree according to its intent." He was not called upon or authorized to decide any of the issues in the cause, for as he says: "Judge Cothran has decided the issues in this case." His duty, therefore, was simply administrative—not judicial. The real questions, then, are whether he has confined himself to a construction of Judge Cothran's decree in



order to carry it into effect, and whether he has placed the proper construction upon such decree.

To determine these questions, it will be necessary to consider what was adjudged by the decree of Judge Cothran; or, to be more precise, whether he determined anything as to the order in which the mortgaged property was to be subjected to the payment of the mortgage debt. After a careful examination of that decree, as well as the opinion of this court affirming it, we are unable to discover any indication that such a point was ever presented to the mind of Judge Cothran—much less that it was ever adjudicated by him. No such point is alluded to in the complaint or any of the pleadings, nor was there any testimony adduced as to this matter. No such issue having been raised, either in the pleadings or the evidence, upon which Judge Cothran heard the case, there was no call for him to decide it; and accordingly we find no allusion in the decree to the question of the order of liability of the mortgaged property. The real controversy before Judge Cothran was whether the two mortgages, purporting to secure the payment of the bonds therein described, respectively, which were not offered in evidence, were really intended to secure the same debt which was represented by the three thousand dollar note, which was offered in evidence, and the decision simply was that such was the real intention, and hence that the plaintiff was entitled to judgment of foreclosure of both of the mortgages; and such, no doubt, would have been the judgment then rendered if the judge had been furnished with the necessary papers to enable him to formulate the judgment. But there is not a word said in the decree, or even any intimation given that one of these mortgages was intended as a prior security, and that the other could only be resorted to in case the former proved insufficient. It seems to us, therefore, that Judge Pressley has not confined himself simply to an order carrying into effect Judge Cothran's decree, but has gone further and adjudged a new issue not raised before or decided by Judge Cothran, and that in this respect there was error.

But, in addition to this, even if the question were an open one, we are unable to concur in the view taken by Judge Pressley. As we have said, there is no allegation in the pleadings, nor is there

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any evidence that the intention was that the Gervais street mortgage should be the primary security for the mortgage debt, and the Blanding street mortgage only secondary security, and in the absence of any such allegation or proof we are unable to see what warrant we would have for concluding that such was the intention of the parties. On the contrary, the more legitimate conclusion would seem to be, that while both of these mortgages were designed to secure the debt of three thousand dollars, yet it was only in the proportions designated in the mortgages respectively, that the mortgaged property was to serve as such security—that is to say, the Gervais street property was pledged, so to speak, for two thousand dollars—two thirds of the debt—and the Blanding street property for one thousand dollars—the remaining third; and hence that the Gervais street mortgage could only be foreclosed for the amount which it was intended to secure, and for the balance resort must be had to the Blanding street property.

This seems to have been the view upon which the complaint was framed, for, after stating the facts, the demand for relief is: 1st. That the mortgage for two thousand dollars—the Gervais street mortgage—be foreclosed, the property sold, and the proceeds paid to plaintiff. 2nd. That the mortgage for one thousand dollars—the Blanding street mortgage—be foreclosed, property sold, and proceeds applied to debt of plaintiff. 3rd. In the alternative—that the proceeds of such sales be applied, either to the payment of the bonds secured by said mortgages, as purported by the tenor of the mortgages, or to the payment of the three thousand dollars mentioned in the note, if such is ascertained to be the real intention of the mortgages. This shows that the plaintiff in his complaint recognized the view that these mortgages were only designed to secure certain specified portions of the debt, and that neither was intended to secure the entire debt. And when Judge Cothran, in his decree, adjudged “that the plaintiff herein have the relief demanded in his complaint,” it seems to us that he converted into a judgment, the demand made by the plaintiff in his complaint, and as the plaintiff made no such demand, as is now made by his representative, that each of these mortgages shall be foreclosed for the entire debt of three

thousand dollars, instead of the proportions thereof distinctly designated in the mortgages ; and especially when it is demanded that one of the mortgages shall be regarded as the primary security for the entire debt, and the other secondary only, it seems to us that such demand not only comes too late, but has no foundation either in the pleadings or the evidence.

The circumstance mentioned by Judge Pressley as leading him to the conclusion which he adopted—that the note for three thousand dollars was the joint note of the mortgagors, and that the Gervais street property was their joint property, while the Blanding street property was the sole property of Tappan, does not seem to us sufficient to warrant such a conclusion, in face of what the parties actually did and put in writing. In view of the preceding decision in this case we must assume that the real object of both of the mortgages was to secure the payment of the debt of three thousand dollars, but in what proportions the property mortgaged was to serve as such security does not seem to have been determined, in express terms, though we think it has been, by implication at least, as will be seen by what we have already said, as well as by the fact, strongly relied on both by the Circuit Judge and by this court, that the sums mentioned in the two mortgages make up the precise amount of the note, not only clearly negating the idea that one was the primary security and the other secondary merely, but implying that each mortgage was designed as a security for the amount mentioned therein.

Now, assuming the fact to be that the three thousand dollar note was the joint note of Gary and Tappan, and the Gervais street property their joint property, and the further fact that the Blanding street property was the separate property of Tappan, yet if, as most likely was the case, Gary and Tappan wished to borrow from their uncle two thousand dollars for their joint use, and Tappan, at the same time, wished to borrow one thousand dollars for his individual use, what was more natural than that the joint property should be mortgaged to secure the money borrowed for joint use and the separate property mortgaged to secure that which was borrowed for the individual use of Tappan ? It is only in this way that we have been able to account for the unusual form of this transaction ; for there is no allegation, evi-

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dence, or even suggestion that the Gervais street property was at that time supposed to be insufficient security for the sum of three thousand dollars.

Under the view which we have taken of the case, we do not suppose that the other question raised by appellants as to the right to foreclose a mortgage for an amount exceeding the penalty of the bond which it was given to secure, will become of any practical importance; but we may say that the authorities cited by counsel for appellants seem to sustain the view that in such a case judgment cannot be rendered for an amount exceeding the penalty.

We desire to add, with a view to avoid any misconception, that no question has been raised here,<sup>1</sup> as it was in *Warren v. Raymond* (12 S. C., 9), as to the propriety of rendering judgment with leave to issue execution, in an action to foreclose a mortgage, for the whole amount of the debt, before the sale under the mortgage has been made, and the deficiency thereby ascertained, and therefore we are not to be regarded as deciding anything in reference to that matter.

The judgment of this court is, that the judgment of the Circuit Court, except in so far as it directs a sale of the Gervais street property under the mortgage given to secure the debt constituting the second cause of action, be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

A petition was filed for a rehearing of this case upon the ground stated in the order granting this petition.

January 6, 1888. The following order was passed

PER CURIAM. From an examination of this petition, together with the opinion of this court, it does appear that the language used in announcing the judgment of this court is broader than was manifestly intended by the course of reasoning adopted, in that, while the effect of such language would be, not only to reverse the construction placed upon Judge Cothran's decree

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<sup>1</sup>The third exception seems to have made this point, but it was not argued by counsel for appellants.—REPORTER.

which *was* intended, but also to reverse so much of Judge Pressley's decree as rendered judgment and authorized the issue of execution for the whole amount of the debt which *was not* intended. It is therefore ordered, that, for the purpose of considering and correcting this apparent discrepancy, the case be set down for rehearing, upon this point, on the call of the docket for the Fifth Circuit at the present term. It is further ordered, that the clerk of this court do forthwith notify the counsel in the cause of this order.

On January 19, 1888, by agreement of counsel, the following order was passed by the Chief Justice:

Upon consideration of the petition for a modification of the decree of this court on the appeal in the above entitled cause, and with the consent of counsel for appellants and respondent announced in open court, it is ordered, that said decree be so amended as to read as follows, to wit: The judgment of this court is, that the judgment of the Circuit Court be modified in conformity with views herein announced, and that the cause be remanded to that court for such further proceedings as may be necessary.

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WARDLAW & EDWARDS v. RAYFORD.

1. A new trial will not be granted for the improper admission of hearsay evidence, after objection made, if the same declarations are afterwards testified to by another witness without objection, and the matter is abundantly proved by other competent testimony.
2. Where a witness is permitted to testify as to declarations of a certain character made to him, and he details declarations of another character, not admissible under the rules of evidence, the proper practice is to move to strike out the answer of the witness.
3. Under the assurances of M. that V. had unincumbered title to a tract of land, P. took a mortgage of this land from V. to secure advances. Afterwards C., acting under like assurances from M., took an assignment of P.'s mortgage, and then took a new mortgage from V., including therein the balance due on the P. mortgage, and also a debt otherwise due him by V. This second mortgage was foreclosed and the land sold. In action by these purchasers against M. (who had ob-

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tained possession of the land after this sale), *held*, that the purchasers were in privity with C., and through C. with P., and that M. was estopped from asserting title antedating these mortgages, as well by his representations to P. as by those made to C.

4. If the purchasers were not in privity with P., they would be regarded in equity as the assignees of the P. mortgage, and entitled to claim for that mortgage the estoppel attaching thereto.

Before HUDSON, J., Abbeville, October, 1886.

This was an action by Wardlaw & Edwards against E. H. Rayford and James McCelvey for the recovery of real property, commenced September 11, 1885. The case involved the question of the delivery of a deed by defendant McCelvey to Mrs. Vaughn, under whom plaintiffs claimed, and the question of estoppel. The Circuit Judge, after leaving to the jury the fact of delivery, charged upon the matter of estoppel as follows:

Now, gentlemen, there is another view of this case under the evidence; another proposition of law arises. The mortgagees here, Calhoun and Parker & Hill, testify that they made inquiry of James McCelvey himself before they would extend credit or take the mortgage, or about that time. Now, it is stated by Messrs. Parker & Hill, particularly Mr. Parker, that James McCelvey told him that the title was in Mrs. Vaughn, but that the paper was lost, got burned, something of that sort, "and if you are not satisfied with that, I will make the title over again." To Mr. Calhoun he said that the land was paid for, and that he had made a title; he does not remember whether he said to Mr. or Mrs. Vaughn, but to one or the other. Now, what is the effect of that? The effect of it is that Mr. James McCelvey now cannot deny it. He is now estopped, if it be so.

You have heard the witnesses. If those witnesses have told the truth, then Mr. James McCelvey has shut his mouth, and he could not in an action by Mrs. Vaughn against him, or by any one claiming under Mrs. Vaughn, deny it. That is what we call estoppel. Even if it were not so, his saying so makes it so for the purposes of this case. It shuts his mouth, and any one acquiring title under representations made by him which induced them to purchase—the party at the sale—would stand exactly on

the footing of the mortgagee. So if, gentlemen, one of you, knowing all the surroundings, knowing whether you have got a title to the land or not, is approached by one who makes an inquiry, saying: I wish to take a deed to that land, or a certain mortgage by a party, I wish to know the truth, and you say, Go ahead and take the property, and if you have any doubt about the title being lost, I will make you another, and the sale takes place and the party comes for the place under that mortgage, you cannot deny the fact.

If you come to the conclusion that the title was in Mrs. Vaughn, that ends the case and the plaintiffs must recover. If you come to the conclusion that the deed was not executed, but that afterwards these parties being in possession of the land, Mr. McCelvey said she (Mrs. Vaughn) had title and induced the party to take the lien, then when the purchaser comes forward, Mr. James McCelvey will have to stand up to what he said; he cannot get out of it. A representation which induces a party to make advances, say, and which, if not true, would work an injury to another (and you see in this case what an injury it would work to the purchaser), operates as an estoppel. If you come to the conclusion that he did say that, he is estopped, and your verdict will be for the plaintiff.

So, gentlemen, I have endeavored to explain the points of law in this case, and if you come to the conclusion that the plaintiffs have got title in this land, you will find for the plaintiffs. And if you come to the conclusion that the deed was never made out to Mrs. Vaughn, and that Mr. McCelvey has not estopped himself, then your verdict will be for the defendants. If the plaintiffs are entitled to recover, they are entitled to damages for wrong detention. Damages would be reasonable rent for use and occupation for the years 1885 and 1886, inasmuch as the defendants have been in possession and use and occupation. So make a reasonable estimate of what it is worth, and that will be the damages. So if you find for the plaintiffs, say, we find for the plaintiffs the land in dispute and so many dollars damages. If you find for the defendants, say, we find for defendants. Take the record.

The jury returned the following verdict: "We find for the plaintiffs the land in dispute and fifty dollars damages."

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*Messrs. Perrin & Cothran*, for appellants.*Messrs. Parker & McGowan*, contra.

July 13, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This action was brought by the plaintiffs to recover possession of certain real estate, of which the defendant, Rayford, was in possession, claiming to be the tenant of his co-defendant, James McCelvey. The answer admits the partnership of plaintiffs and the allegation that Rayford was in possession, claiming to be the tenant of McCelvey, and denies the other allegations of the complaint.

The claim of the plaintiffs is that the land in question was sold October 6, 1884, under proceedings to foreclose a mortgage, dated March 6, 1882, executed by Margaret Vaughn to one Calhoun, at which sale the plaintiffs became the purchasers; and the real controversy was whether Mrs. Vaughn had title to the land at the time she executed the mortgage to Calhoun. It was conceded that McCelvey was originally the owner of the land, but the plaintiffs claim that in 1872 he conveyed the land to Mrs. Vaughn, who immediately went into possession and remained in possession until the spring of 1885, when she moved off and possession was taken by Rayford as the tenant of McCelvey, and offered testimony tending to establish these facts. It was not denied that in 1872, when Mrs. Vaughn went into possession, a deed to her for the land was prepared at the request of McCelvey, and signed and sealed by him, but there is dispute as to the delivery of said deed. The plaintiffs, on the one hand, claim that while not actually put into the hands of Mrs. Vaughn, it was put in the hands of Mr. Mars to be recorded, and was afterwards destroyed by fire before it was recorded; while the defendants, on the other hand, contend that the deed was never actually delivered, and not intended to be delivered until Mrs. Vaughn paid the purchase money, and it was left with McCelvey's son to be held by him until such payment was made, and he deposited it for safe keeping in the safe in Mars's store where it was probably destroyed when the store was burned.

When Tolman, the person who drew this deed and who was



one of the subscribing witnesses, was on the stand as a witness in this case, after testifying to the preparation of the deed according to the instructions of McCelvey, and its signing and sealing by him, he was asked if he knew anything about the delivery of the deed, to which he replied: "I know nothing about the delivery of the paper directly, I may know something about it indirectly." Then, after stating that his information was not derived from McCelvey, in reply to a question, "What became of the deed?" stated that some time after the deed was signed he went to Mr. Vaughn's house to draw a mortgage (which, no doubt, was the mortgage from Mrs. Vaughn to Parker & Hill, hereinafter referred to), and when he was proceeding to say something that Mrs. Vaughn said on that occasion, he was stopped by an objection from defendants' counsel, when the court ruled the question competent. The witness resumed, and said when he called for the deed originally prepared by him (doubtless for the purpose of enabling him to draw the mortgage), "Mr. Vaughn asked for the papers and Mrs. Vaughn—" when he was again stopped by the objection of counsel, and the court ruled that "he can say that he called upon them but didn't get it; he can state the reasons." To which ruling exception was noted. The witness again resuming, testified as follows: "Mr. Vaughn remarked that the deed had been left with Mr. Mars, and in Mr. Mars's store, and it was burned; but I did not understand him to say that it (the paper) was burned in Mr. Mars's store or was burned here. It was left there to be recorded and it happened to be burned." It seems from the testimony that Mars's store was burned, and also that the court house with the public records were destroyed by fire in 1872.

It appears from the undisputed testimony that on June 15, 1881, Mrs. Vaughn executed a mortgage on the land in controversy to Parker & Hill, and Parker testified that before this mortgage was taken, having heard some controversy as to the ownership of the land, he applied to McCelvey, who told him that the land belonged to Mrs. Vaughn, and not to her husband; that he had conveyed the land to her; that the deed was put in Mars's hands to be recorded, and he did not know whether it was burned in the store or in the court house, and that he said:

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"Parker & Hill need not be alarmed, that he would get Col. Tolman to draw up a new deed at any time we wanted it, and upon that condition we saw the Colonel and took him down to the house and got a new mortgage," in place of one they had previously received from David Vaughn, the husband of Mrs. Vaughn. This witness, in detailing what occurred when he and Tolman went to the house to get the mortgage, said: "Col. Tolman asked for the deed, and I think the answer was made by David Vaughn, any how, she didn't make any objection, that this deed had been put in Mars's hands to record, and it had been destroyed either in the court house or in the store." And here it will be observed that the "Case" does not show that any objection was interposed to the proof of David Vaughn's declarations by this witness. Hill, the other partner, also testified that when he asked McCelvey about the matter: "He told me that the land had been originally sold by himself to Mrs. Vaughn, and upon that I had Mr. Parker go down and had the mortgage made in Mrs. Vaughn's name, and surrendered the mortgage given us by David Vaughn." He also testified that McCelvey said: "that he would make us a title, if necessary, to the land—that the land was Mrs. Vaughn's," adding that he was perfectly satisfied with what he had already received from her, and never expected to make any further demands for payment.

It seems that when the debt secured by the Parker & Hill mortgage became due, and they were contemplating proceedings to enforce their mortgage, Calhoun, who held an unsecured claim against David for a mule, amounting to eighty dollars, paid Parker & Hill the balance due on their mortgage, about sixty dollars, and took an assignment of it, and proposed to Mrs. Vaughn that if she would give him a new mortgage for one hundred and forty dollars, covering both amounts, he would take up the balance due Parker & Hill. To this proposition Mrs. Vaughn assented, and accordingly the mortgage to Calhoun was executed, which was afterwards assigned to the plaintiffs, and their title as above stated is derived from their purchase at the sale to foreclose the Calhoun mortgage.

When Calhoun was examined as a witness he testified, in answer to a question whether he had ever had any conversation

with McCelvey in reference to the ownership of this land, as follows: "I had a conversation with him, I think it was about in 1880, and he told me that he sold the land to Mr. Vaughn." The witness goes on to explain how he came to have this conversation, by stating that in a negotiation with David Vaughn for the sale of a mule he learned that David claimed to have bought the land from McCelvey and paid for it by mauling rails, &c., and being doubtful about this statement, he says: "I asked Mr. McCelvey about it and he said, yes, he had sold him the land, and that the land was theirs." In his cross-examination he says that McCelvey told him, "that he had nothing to do with the land; that it was theirs, his, or Mrs. Vaughn's."

The jury having rendered a verdict in favor of the plaintiffs, and judgment having been entered thereon, the defendants appeal upon the following grounds:

"I. That the presiding judge erred in admitting as testimony the declarations to third parties of Margaret Vaughn, the mortgagor in the foreclosure proceedings, under which the plaintiffs claim title, concerning the delivery of the deed or the possession of the title from James McCelvey to Margaret Vaughn to the land in dispute.

"II. That the presiding judge erred in admitting as testimony the declarations to third parties of David Vaughn, husband of Margaret Vaughn, concerning the same matter.

"III. That the presiding judge erred in charging the jury that the declarations of James McCelvey to Parker & Hill—that Mrs. Vaughn had title to the land; that the deed of the land had been delivered to her, and other declarations concerning the title and its delivery which induced Parker & Hill to take a mortgage from Margaret Vaughn—estopped him from disputing the title of the said Margaret Vaughn in the action brought by the plaintiffs herein against the said James McCelvey; there being no evidence that the plaintiffs claimed through or by the said Parker & Hill.

"IV. The defendant, James McCelvey, excepts further to so much of the charge of the presiding judge as holds that the declarations of James McCelvey (concerning the title or the delivery of the deed aforesaid) to parties other than the plaintiffs

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or their privies, estopped him from denying the title of the said Margaret Vaughn in this action."

In reference to the first exception, it will be sufficient to say that we are unable to find in the "Case," as prepared for argument here, that any declarations of Mrs. Vaughn were received in evidence; and this seems to be recognized by the counsel for appellants, as in his argument he confines himself to the question of the admissibility of David Vaughn's declarations, which were received in evidence. Be that as it may, however, it will be sufficient to consider the question of the admissibility of David's declarations, as they would both be governed by the same principles.

It will be observed that the declarations of David Vaughn were received in evidence twice—first, when the witness, Tolman, was under examination, when they were objected to; and, second, when the witness, Parker, was allowed to testify to the same declarations without objection. It would seem, therefore, to be a question of no real, practical importance, whether the declarations were competent or not—for even if they should have been ruled out when testified to by Tolman, under objection from defendants, there certainly was no error when the same declarations were received from the witness, Parker, without objection. But in addition to this it will be observed that the ruling of the court, as to this matter, which is the only thing for us to consider, was not that the declarations of David could be received to show the delivery of the deed by McCelvey, or even to show that the deed was left in Mars's store to be recorded, but the ruling simply was that the witness could state that he had called upon the Vaughns for the deed, "but didn't get it; he can state the reasons"—meaning, doubtless, that the witness could say that he was told that the deed was destroyed by fire. That was the extent of the ruling of the Circuit Judge, and if not strictly correct would constitute no ground for a new trial, when the testimony on all hands was that the paper claimed to be a deed had been burned.

It is true that the witness did go on to say that David Vaughn did say that the deed was left with Mars to be recorded, and this would touch the question of delivery; but aside from the fact that there was other testimony, clearly competent, to this same fact,

the Circuit Judge never ruled that such additional declaration of David Vaughn was competent, and it does not appear that there was any motion to strike out such additional declaration, which would have been the proper course, in case the witness, after being permitted to testify to declarations of a certain character—the reasons why the deed could not be had—should go on to detail declarations of another character going to show the delivery of the deed. Now, when we see that the very same fact which the declarations of David Vaughn are claimed to be incompetent to prove, was abundantly shown by other clearly competent testimony, and especially when we see that the Circuit Judge never did rule that the declarations of David were admissible to prove the delivery of the deed, or any fact tending to show that the deed had been delivered, but simply to show the loss of it, we think it clear that the second ground of appeal cannot be sustained. See *Smythe v. Tolbert*, 22 S. C., 133.

The third and fourth grounds of appeal, as to the matter of estoppel, may be considered together. It will be observed, however, that the third exception seems to be framed under a misconception of what the Circuit Judge did actually say to the jury. It represents the judge as saying that the declarations of McCelvey to Parker & Hill alone, in regard to Mrs. Vaughn's right to the land, would estop him from disputing the title of Mrs. Vaughn in this action; whereas, in fact, the Circuit Judge, after calling the attention of the jury to the testimony of not only Parker and Hill, but also Calhoun, as to the declarations of McCelvey with respect to Mrs. Vaughn's title, instructed them, "If those witnesses have told the truth, then Mr. James McCelvey has shut his mouth, and he could not in an action by Mrs. Vaughn against him, or by any one claiming under Mrs. Vaughn, deny it." So that there is no practical foundation for the point principally urged by appellant's counsel, that a declaration of McCelvey that Mrs. Vaughn had title, made to Parker & Hill alone, would not operate as an estoppel in favor of these plaintiffs, who, as it is argued, do not claim under Parker & Hill.

But we are not disposed to rest the case upon this misconception of the judge's charge. There can be no doubt that in a

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proceeding by Parker & Hill to foreclose their mortgage McCelvey would have been estopped by his declarations and assurances to them that the title was in Mrs. Vaughn from disputing her title, either in the action for foreclosure, or in an action brought by a purchaser at such foreclosure sale to recover possession of the land. In other words, the estoppel would operate not only in favor of Parker & Hill themselves, but also in favor of all persons claiming under or in privity with them. Now, certainly when Calhoun purchased the Parker & Hill mortgage and became the assignee thereof, he succeeded to all their rights, and with equal certainty, when the land was sold under the mortgage which he had been induced to take, not only by the representations made to him personally by James McCelvey, that he had no claim on the land, but also by the representations made to his assignors, Parker & Hill, the purchasers at such sale, the plaintiffs herein, succeeded to all his rights; and that is what we understand by privity. The plaintiffs were in direct privity with Calhoun, and he with Parker & Hill, and if Calhoun could, by virtue of his privity with Parker & Hill, claim the benefit of the representations made by McCelvey to them, we see no reason why the plaintiffs, by reason of their privity with Calhoun, could not claim the same benefit which their vendor, Calhoun, could.

Even if the plaintiffs, as purchasers under the Calhoun mortgage, could not be regarded as strictly in privity with Parker & Hill, and should, therefore, be unable to establish their title against McCelvey, yet the Parker & Hill mortgage not having been satisfied, equity would certainly require that it should be enforced for the protection of the purchasers from Calhoun, the assignee thereof, and it is, and must necessarily be conceded, that under that mortgage the estoppel could be successfully set up. A Court of Equity, with all the necessary parties before it, will not require a resort to such a roundabout proceeding, when the same result can be reached by a more direct proceeding. But when, in addition to this, the testimony shows that McCelvey disclaimed title, not only to Parker & Hill when they took their mortgage from Mrs. Vaughn, but also to Calhoun, before he took his mortgage, there cannot be a doubt that the Circuit Judge was entirely right in instructing the jury that if they believed this

testimony, McCelvey was estopped from disputing the title of Mrs. Vaughn in this action.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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MONTGOMERY v. CLOUD.

1. Where a referee reported that an administrator had sold land of his intestate and used the proceeds in paying debts, and no exception was taken to such finding, the question whether the statute of limitations protected him from accounting for these proceeds is not involved. Had exception been taken, the Brief fails to state facts sufficient to show error in the finding. The mere fact that the administrator might have used other funds for the purpose is insufficient.
2. Administration was granted in 1861. In 1868 the administrator made his first and only return showing a balance due by him to the estate. To action brought against him in 1884 for an accounting, *held*, that the statute of limitations and the presumption of payment, and therefore also the defence of laches, were not a bar to the relief demanded.

Before FRASER, J., Fairfield, June, 1886.

The opinion fully states the case.

*Messrs. Gaillard & Reynolds*, for appellant.

*Mr. G. W. Ragsdale*, contra.

July 16, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. In 1861, David H. Montgomery died intestate, leaving real and personal property both in this State and in the State of Florida. John B. Cloud administered upon the estate in this State, and soon after sold the personal property. It seems that the heirs made the administrator (Cloud) their agent to sell also a tract of land, which he did for \$900, and received the purchase money therefor. In 1868, March 30, the administrator filed his first and only return, charging himself with the amount of the sale-bill of personal property, \$5,101.29,

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and allowing himself divers credits, amounting to \$1,362.83; leaving \$3,738.46, as the balance due according to said return. The plaintiffs, heirs at law of the intestate, are and have been for many years not residents of this State, and the estate for several years remained unsettled. In January, 1884, they instituted this proceeding for an account against the administrator, including the price of the land sold by him as agent of the heirs.

The administrator, Cloud, answered alleging that the return made by him in 1868 was in many respects erroneous—more especially that the administrator was charged with the value of the entire personal estate, whereas in fact the personal estate, consisting in large part of negro slaves, had, before the making of said return, been divided among the parties and duly delivered up or paid over to them: that the administrator had duly accounted for all assets, of whatever character, which came into his hands as administrator, and interposing the plea of laches, presumption of payment from lapse of time, and the statute of limitations.

It was referred to Charles A. Douglass, Esq., to determine the issues of law and fact and to state the account of the defendant as administrator. Neither the testimony nor the account stated are in the Brief, but the referee reported as follows: "That the defendant, John B. Cloud, as the agent of all the heirs at law, did, on January 25, 1862, sell a tract of land, the same being the property of the intestate, and applied the proceeds of such sale to the payment of the debts of said intestate; that the personal property consisted largely of slaves—none of which slaves were ever sold, but the same were divided among the heirs at law, at a valuation placed thereon by agreement; that the defendant, John B. Cloud, made his first and only return on March 30, 1868; and there is now due by the said John B. Cloud, as administrator, to the plaintiffs and the defendant, Margaret Cloud (wife of the administrator), as heirs at law of David H. Montgomery, the sum of six hundred and thirty-two dollars and forty-nine cents (\$632.49)." And he held as matter of law, "that the action of the plaintiffs is not barred by the statute of limitations, nor by laches, nor by lapse of time; that the defendant is not chargeable with interest on annual balances in his



hands; that not having made his returns as required by law, the administrator is not entitled to commissions, but that he is entitled to certain commissions by virtue of a contract between himself and the heirs at law."

Both parties excepted to this report, and Judge Fraser held that there was nothing in the case to warrant the court in substituting, in the place of the statute of limitations and of the presumption from lapse of time, the imputation of laches on the part of the plaintiffs; and then, not having sufficient data upon which to found a satisfactory conclusion as to whether the referee was correct in his statement of the amount of the uncollected notes, he recommitted the whole matter of account, with certain instructions on particular points, to the referee.

From this decree the defendant administrator appeals to this court, upon the following grounds: "I. For that his honor did not hold that the demands of the plaintiffs herein are barred by the statute of limitations. II. For that his honor did not hold that the said demands are barred by the laches, negligence, and unreasonable delay of the plaintiffs, and by presumption of satisfaction. III. For that his honor did not hold that, even if said demands are not wholly barred, yet said demands are barred so far as they have relation to the proceeds of sale of the tract of land mentioned in the fifth paragraph of the complaint. IV. For that his honor did not hold that as to the said proceeds of sale (of the land) the defendant, John B. Cloud, was not trustee of an express trust, but only of an implied or constructive trust."

Exceptions 3 and 4 relate to the proceeds of the tract of land sold as agent. The action was brought by the heirs of the intestate against John B. Cloud, as administrator. The proceeds of the land never were in his hands as administrator, but as agent under some agreement, which does not appear. But really it is unnecessary to go into that, as we cannot consider that the matter is properly before us. The Circuit Judge disposes of it as follows: "This exception refers to the sum of \$900, being the proceeds of a sale made by the administrator of a tract of land with the consent of the heirs, and held and *used by him in the payment of the debts of the estate*, and for which purpose they had allowed it to be sold. This money did not come to his hands

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as administrator, and he held it as agent of these heirs. The referee finds as a fact that this money was used in the payment of the debts, and to this finding there is no exception. It is, therefore, not necessary to consider any special relation this fund may have had to the statute of limitations, or in the mode of computing interest. None of it, under this state of facts, seems to have entered into the balance in the administrator's hands, and to which alone, on the statement before me, these questions of interest and the statute of limitations apply." We cannot say that this was error. Even if the finding of the referee that the proceeds of the land had been paid out on debts, had been excepted to, we have not the means of determining as to the correctness or incorrectness of that finding. We could not disturb that finding simply from the circumstance pointed out, that if all the sale-bill had been collected, there could have been no necessity for the use of all the proceeds of the land, in paying the debts of the estate as returned by the administrator.

Exceptions 1 and 2 complain of error on the part of the judge, in holding that the right of the plaintiffs to an account against the administrator was not barred either by the statute of limitations, presumption of settlement, or payment from lapse of time, or by laches. It is true that, in seeking this account against the administrator, there was long delay, from the last and only return filed in 1868, about sixteen years. To some extent perhaps this long delay was accounted for by the loss of securities, the confusion, &c., incident to the war, and the absence from the State of all the distributees except Margaret, the wife of the administrator. But, as we understand it, an administrator as to the assets in his hands is a *quasi* trustee, and as between him and the distributees there is no adverse possession and the statute of limitations as such does not apply. *Angel Lim.*, §§ 166, 168; *Story Eq. Jur.*, § 1520; *Beard v. Stanton*, 15 S. C., 165, and authorities.

There is, however, one well defined exception to this rule: where the trustee does some act purporting to be an execution of the trust, he shakes off the character of trustee and thenceforward stands in an adverse position. See *Beard v. Stanton*, *supra*. If the administrator, Cloud, in making his return in 1868, had

given to it such a character as to disclaim the trust, and to claim that he had settled the estate in full and owed the distributees nothing, thus putting them on their guard in a public office, then the account would be stated. Whether true or false, such claim made in a public office, might have had the effect of putting into operation the statute of limitations. But such was not the character of the return made. On the contrary, it seems to have been an acknowledgment of his continuing trusteeship, and, indeed, the admission of a larger amount than was actually due. We do not think that this return in any manner disclaimed the trust or pretended to throw it off. *Riddle v. Riddle*, 5 Rich. Eq., 32; *Roberts v. Johns*, 16 S. C., 171; *Dickerson v. Smith*, 17 Id., 289. As was said in the case of *Riddle and Riddle*, *supra*: "If an *ex parte* return to the ordinary, in which an executor or administrator strikes a balance against the estate, should be regarded as a discharge of his trust, from which the statute would run as against a bill to account, it would be an alarming disclosure as well to creditors as to legatees and distributees of the deceased," &c.

It seems, however, that in this regard the rule is different as to the presumption of payment arising from lapse of time, and that the presumption arises between an administrator and his *cestui que trust*, who is *sui juris*, precisely as between ordinary creditors and debtors by bond. As expressed by Judge Fraser in *Roberts v. Johns*, 24 S. C., 587: "In the consideration of claims against trustees, when lapse of time is the ground of defence, it is important to bear in mind the distinction between the bar of the statute and the presumption of payment from lapse of time. Whenever the period arrives at which, according to the terms of his trust, the trustee is required to make his final account, and there is no disability on the part of the beneficiary of the trust, the presumption commences to run," &c. According to this rule, when did the presumption begin to run in favor of the administrator? There seems to have been no disability—at what time was he required to make his final account? If at any time before 1868, when he made the return acknowledging his liability, that itself assuredly gave the presumption a new starting point, and counting forward from that time the twenty years

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necessary to raise the presumption had not expired when the action was brought. "In reference to the presumption arising from the lapse of twenty years, it has been held that the presumption is not one of law and therefore conclusive, but one of fact, which may be rebutted in analogy to the principles regulating admissions to take a case out of the statute of limitations." *Pyles v. Bell*, 20 S. C., 369.

As the claim for account against the administrator is neither barred by the statute of limitations, nor presumed paid by the lapse of twenty years, we do not see upon what principle we could hold that the judge committed error of law in refusing to bar it upon the equitable doctrine of laches.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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LESSLY v. BOWIE.

1. A claim for improvements cannot be made by defendant in an action for the foreclosure of a mortgage. Such a claim can be made under the betterment laws only after final judgment in an action "for the recovery of lands and tenements."
2. In a sale of land there is no implied warranty; a purchaser, in the absence of fraud, can only protect himself by covenants in writing.
3. The general warranty in a deed of conveyance embraces all the covenants formerly used in conveyances of land; and for a breach of any of them, the purchaser may recover damages by original action, or by way of counter-claim to an action for the purchase money.
4. An outstanding claim of dower is an encumbrance, but the vendee is not entitled to recover damages therefor as a breach of his warranty until he has extinguished it (and then only to the extent of his payment), or unless he has been thereby evicted.
5. Outstanding paramount title to land, in whole or in part, is a breach of the warranty of seizin at the date of the deed, for which, possibly, a court of law would award nominal damages, although there had been no eviction; but such a case furnishes no ground in equity for the rescission of the contract of purchase, and cannot be interposed as a defence to an action for the foreclosure of a mortgage given for the purchase money.

Before FRASER, J., Abbeville, February, 1887.

This was an action by Cynthia J. Lessly against Jacob H. Bowie, commenced December 17, 1886, for the foreclosure of a purchase money mortgage of a tract of land. The defendant answered, admitting the execution of the note and mortgage sued on, but alleged that said premises had been conveyed to him by plaintiff under a deed of the same date as the mortgage sued on, and that this deed contained a covenant of general warranty. It further alleged the grounds of defence stated in the opinion, which also states all other matters necessary to a full understanding of the case.

*Messrs. Perrin & Cothran*, for appellants.

A general warranty in our deeds of conveyance embraces the five English covenants. 9 *Rich.*, 374. A covenant of seizin, if broken, is broken as soon as made. 3 *McCord*, 449. But the covenant against encumbrances and for quiet enjoyment is not broken until eviction, or damages ascertained and paid. 5 *Rich.*, 12. *Whitworth v. Stuckey* involved matters of encumbrance and *partial* failure of consideration, and is inapplicable here. 1 *Rich. Eq.*, 405. And in that case there seemed to be no probability of any action being brought. This defendant might have brought action to rescind the contract before eviction, or purchase money paid. 3 *McCord*, 449; 1 *Speer*, 124; 3 *Hill*, 305. Or he might set up such failure, before eviction, as a defence to an action for the purchase money. 25 *Wend.*, 116; 2 *Nott & McC.*, 189. Breach of the covenant of seizin makes the cause of action—not eviction. 9 *Rich.*, 377; 12 *S. C.*, 42. This defence is particularly available under the code, *section* 171. 23 *S. C.*, 388; 24 *Id.*, 446. If defendant is entitled to rescission, court will not order execution of the contract. 1 *Rich. Eq.*, 409. See, further, 1 *Bay*, 256, 326; 2 *Id.*, 558; 1 *Nott & McC.*, 187; 1 *Hill*, 321, 324; 1 *Bail.*, 217, 250; 22 *S. C.*, 185.

*Mr. Eugene B. Gary*, contra.

In action to foreclose mortgage given for the purchase money, defendant cannot set up paramount title in a third person as a

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*defence* under his covenant of warranty, but can only get the benefit of a want of seizin in his grantor by alleging it as a *counter-claim*. 13 *S. C.*, 203; 6 *Rich.*, 361; 1 *Rich. Eq.*, 409; 20 *S. C.*, 553; 12 *Id.*, 56. Nor is outstanding paramount title a defence while the vendee remains in possession. 22 *S. C.*, 169; 1 *Rich. Eq.*, 409; 1 *Rich.*, 153; 3 *Id.*, 196.

July 16, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. In 1885 the plaintiff sold the defendant a tract of land for \$1,000, conveyed the same to him with the usual general warranty of title, and to secure the purchase money took a sealed note and a mortgage of the premises. After the note fell due the plaintiff instituted these proceedings to foreclose the mortgage. The defendant answered :

"First. That the plaintiff was not seized of an absolute estate in fee, or of any estate whatever in said land in her own right at the time of, or any time since, the execution of said deed; but, on the contrary, the absolute fee or estate in the said premises did, and does now, vest in James H. Ballard and Thomas B. Cook, and others, whose names are unknown to the defendant, who are the sole heirs at law of Jemima Kemp, *alias* Jemima Hughes, who died in possession of, and as the owner of, the legal title in fee of the said premises without any child or children and intestate.

"Second. That the defendant entered into the possession of the said premises under said deed, and has made valuable improvements thereon; that he has not been permitted peaceably to occupy and enjoy said premises, but, on the contrary, he has been served with a complaint and summons in an action by the aforesaid heirs at law of the said Jemima Kemp for the possession of the said premises, which suit is now pending in said court, &c.

"Third. As a partial failure of consideration of said note and mortgage, defendant alleges that the said Jemima Kemp, *alias* Hughes, at the time of her death, was seized in fee and in possession of the premises, and was the alleged wife of Abner L. Hughes, but died childless and intestate; that subsequently to the death of Jemima Kemp the said premises were sold by the

sheriff of Abbeville County as the property of the said A. L. Hughes by virtue of an execution issued upon a judgment of S. McGowan against the said A. L. Hughes, and purchased by James E. Todd, the alienor of the said plaintiff, and the plaintiff was not, at the time of executing said deed of conveyance, nor since, the owner of any other interest in said premises than that which was purchased by the said Todd at said sale and conveyed to her.

"Fourth. That previous to the said judgment (S. McGowan's) the said A. L. Hughes married Margaret Waldrop, who is now living, and has notified the defendant that she intends to bring her action for her dower, as her husband, A. L. Hughes, since his last marriage, has departed this life."

"Wherefore the defendant demands judgment: 1. That the plaintiff be enjoined from proceeding further with this action until it be determined in whom the title to the said premises rests. 2. That the said complaint be dismissed, and that he have his costs and expenses," &c.

On January 4, 1886, after the commencement of this suit for foreclosure, the action of James H. Ballard and others against James H. Bowie and others was instituted in the Court of Common Pleas for the recovery of the said land. Notice was given to C. J. Lessly, the plaintiff, to defend the title in that case.

The cause came on to be heard by Judge Fraser, and the plaintiff interposed an oral demurrer that the answer did not state facts sufficient to constitute a defence. The judge held that the claim for improvements could not be made in an action for foreclosure of a mortgage; and as to the alleged paramount outstanding title decreed as follows: "In cases where there is a covenant of warranty of title, the purchaser has his remedy over on his covenant, in case there is a failure of title. The purchaser may maintain his action on the covenant before eviction, if he can show that the grantor had no title at the time of the sale. *Johnson v. Veal*, 3 *McCord*, 449. When, however, he waits until an action is brought for the purchase money, he cannot set up by way of defence a failure of title in whole or in part, at least where, as in this case, there has been no actual eviction. This I understand to be the rule as laid down in *Whitworth v.*

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*Stuckey*, 1 *Rich. Eq.*, 409, and reaffirmed in *Childs v. Alexander*, 22 *S. C.* (1884), 185." And so ruling he sustained the demurrer and gave judgment of foreclosure.

From this decree the defendant appeals to this court, alleging error in the following particulars: "I. In sustaining the demurrer and dismissing the answer. II. In holding 'that whenever a purchaser waits until an action is brought for the purchase money, he cannot set up by way of defence a failure of title, in whole or in part, at least where, as in this case, there has been no eviction.' III. In giving judgment of foreclosure and for sale of the mortgaged premises. IV. In holding that if the answer is true, it is no defence. V. In giving judgment for \$1,155.64, the mortgage debt."

We agree with the Circuit Judge, that a claim for improvements cannot be made in an action for foreclosure of a mortgage. By the terms of the betterment act the right to claim improvements is given only after final judgment in an action "for the recovery of lands and tenements." See section 1835 of the General Statutes and amendment of 1885. 19 *Stat.*, 343.

There has been much discussion in our courts as to whether a purchaser of land, who is in possession under general warranty of title, may defeat an action for the purchase money by showing paramount outstanding title in another before he has been evicted or has actually suffered damage. In a sale of lands there is certainly no implied warranty as there may be in reference to personalty. There is no such thing as a failure of consideration arising out of a contract implied, or, as it is sometimes expressed, the equitable condition of sale. A purchaser must protect himself, if at all, by covenants in writing, out of which all his rights of defence must come, except, perhaps, in the case of fraud. *Mitchell v. Pinckney*, 13 *S. C.*, 204. This defendant did protect himself by a deed of general warranty, which, since our act of 1795, has been interpreted to embrace all the covenants used in conveyances of land prior to that time, viz., that the vendor is seized in fee; that he has a right to convey; that the vendee shall quietly enjoy; and that free from all encumbrances; and also it seems for further assurances. See *Jeter v. Glenn*, 9 *Rich.*, 374. It has also been held that damages arising from the breach



of any of these covenants may be set up in an original action, or by way of discount or counter-claim against an action at law for the purchase money.

Assuming, then, that the facts are as stated in the answer (from the force of the demurrer), were they sufficient to constitute a defence to the foreclosure of the mortgage for the purchase money, or was the judge right in sustaining the demurrer? Several matters are separately stated in the answer. First. As to the alleged outstanding claim of dower. That is in the nature of an encumbrance, and was covered and guarded against by the covenant "against encumbrances" embraced in the general warranty. The encumbrance seems to have been in existence at the time the warranty was executed, and in strictness was a breach of it at the time it was made. But, assuming that the mere existence of the encumbrance at the time the deed of warranty was executed, amounted to a technical breach on the instant, it has been held that for such breach alone merely nominal damages are recoverable. *Evans v. McLucas*, 12 S. C., 56. In that case Chief Justice Willard, in delivering the judgment of the court, said: "The question is not directly that of the right to maintain an action for the breach of the covenant, independent of the question of damages, but whether the defendant has sustained any damage that should be allowed by way of counter-claim to the plaintiff's demand. It is very clear in all the authorities that no damage can be recovered until the vendee has either extinguished the encumbrance in whole or in part, and in that case to the extent of payment for the purpose and intent, or unless he has lost the land in whole or in part under such encumbrance. *McCrady v. Brisbane*, 1 Nott & McC., 104, 9 A. D., 676; *Prescott v. Trueman*, 4 Mass., 627, 3 A. D., 246; *De La Vergne v. Norris*, 7 Johns., 358, 5 A. D., 381."

Second. As to the defence interposed of outstanding paramount title to a part of the land. To the extent of the deficiency stated, this was a breach of another covenant embraced in the warranty, viz., that the vendor was seized in fee. That breach also was as old as the deed itself, and, as it has been held, would have supported an original action at law for damages, even before eviction (*Johnson v. Veal*, 3 McCord, 449), but whether

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the recovery in such case would or would not be limited to the recovery of merely nominal damages, it seems to us clear that such outstanding title to only a part of the land could not, in any view, constitute a ground for a rescission or a defence to the action for the whole of the purchase money. Indeed, as we understand, it was admitted in the argument at the bar that this part of the answer setting up partial failure of consideration could not stand as good ground for a rescission or as a defence to the action, and to that extent the order sustaining the demurrer was right.

Third. But it was strongly urged upon us that the facts were so stated in the first defence as to claim that there was paramount outstanding title to the whole land; and the plaintiff never having been seized of any part of it, there was an entire breach of the covenant of seizin at the moment the warranty was executed, for which an action at law would lie for damages then and ever afterwards with or without eviction. And from this it was earnestly urged that in such case, in lieu of, and as a substitute for, such damages at law, equity will decree a rescission of the whole contract. If such an action can be brought at law on the simple breach of covenant, we do not see that the conclusion indicated must necessarily follow. Although several old cases do hold that outstanding paramount title is *eo instanti* a breach of the covenant of seizin, and that the covenantee may bring his action for damages before eviction, yet it is difficult to understand clearly upon what principle the damages in such a case would be assessed, when the purchaser is still in possession, and there has been no breach of the other covenant embraced in the warranty of "quiet enjoyment."

In view of the decisions referred to, it certainly is remarkable that no case can be found in our reports in which damages to the extent of the purchase money have been recovered for a mere technical breach of the covenant of seizin alone without actual damage sustained, or eviction. Indeed, the distinguished Chancellor Johnston, in delivering the judgment of the old Court of Errors in the case of *VanLew v. Parr* (2 Rich. Eq., 340), said: "Arguments were drawn by counsel from a very extensive and critical examination of the law decisions of this State to show that as the law courts, in certain cases, allow damages upon breach

of the covenants of deeds conveying land where there has been no previous eviction, equity should rescind the contract where the remedy at law is incomplete. \* \* \* The law courts seem to have been struggling for years to get clear of the early decisions allowing recoveries on the ground of failure of title without eviction, and they appear to have settled at last in this result—that in actions brought for the purchase money, the purchaser may make a clearly subsisting outstanding title the ground of abatement for the contract value of such part of the premises as it may cover. It has been proposed, as a just inference from this, that where, from the remoteness or contingency of the outstanding title, law cannot give damages, equity should interfere and rescind the contract. But apart from the incompetency of a Court of Equity to try the validity of the outstanding title, is it not obvious that the remoteness and contingency which renders it inappreciable at law, must necessarily make it equally uncertain what degree of importance should be attached to it as a ground for rescission in equity? If the defect of title be such as authorizes a court of law to interfere, be it so. That is one of the advantages of his covenants to which equity leaves the purchaser. But if it be of such a nature that law declares him entitled to no relief in virtue of the security he has himself selected, as was the case in this instance, it seems a strained inference that the declaration entitles him to relief elsewhere,” &c.

But without reopening the argument, we think the question has been finally settled by the more recent and well considered cases, which concur in holding that : “While a purchaser of land remains in quiet possession thereof, he cannot sustain a bill for a rescission or abatement of price on the ground of an outstanding title, unless on the score of fraud.” See *Whitworth v. Stuckey*, 1 *Rich. Eq.*, 410; *VanLew v. Parr*, 2 *Id.*, 350; and *Childs v. Alexander*, 22 *S. C.*, 185, and the authorities therein referred to.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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## YOUNG v. YOUNG.

1. Where there is conflict of testimony, and the master and Circuit Judge differ in their conclusions as to the facts, it is incumbent on the appellant to show error in the Circuit decree, for *prima facie* the decree is correct. In this case, the Circuit Judge was sustained.
2. Where A, about to die, conveyed his lands to B in trust for C, all three parties signing the deed upon an expressed nominal money consideration, but with the further parol agreement that B would pay the debts of A (which was afterwards done), and only one witness signed the deed, but after the death of A, a person present at the time of the execution also signed his name to it as a witness, the deed may be insufficient to carry the legal estate to B, but it will be sustained in equity as against the heirs of A.

MR. JUSTICE McIVER *dissenting*.

Before HUDSON, J., Union, June, 1886.

The opinion fully states the case.

*Mr. D. A. Townsend*, for appellant.

*Mr. C. C. Culp*, contra.

July 19, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. One George M. Young conveyed a tract of land, containing one hundred (100) acres, to his two sons, Thomas J. Young and John H. Young, as tenants in common. Thomas J., as a man of family (wife, Amanda Young), had a house on the common property, and his brother, John H., a bachelor and in feeble health, lived in his family. Amanda M., the wife of Thomas J., made the clothes, did the cooking for the household, and kindly nursed her brother in law, John H., through his illness until he died in August, 1884, leaving some small debts and the following collateral heirs, viz., his said father, George M., and his brothers and sisters of the whole blood, the plaintiff, Christopher C. Young, Thomas J. Young, and Mary J. Layne.

Soon after the death of John, the brother, Christopher C., claiming that he died seized of his half (50 acres) of the said tract

of land, instituted this proceeding for partition, first between Thomas J. and the heirs of John H., and then divide John's part among his heirs. But the defendants, George M., the father, and the sister, Mary J. Layne, disclaimed, the latter by letter and the former in testimony, any interest in John's part as his heirs at law. So that the only question really involved was whether the plaintiff, Christopher, was entitled to his share as heir at law ( $12\frac{1}{2}$  acres), as against his brother, Thomas J., who, being left in possession of the whole tract, claimed John's interest under a deed from him, executed and delivered, as alleged, in his life-time upon valuable consideration, in trust for his wife, Amanda M., during her life, with remainder over to her heirs. Such a deed was produced, bearing date August 7, 1884, with the names subscribed of two witnesses, viz., those of Charles Bolt and James M. Greer, regularly probated and recorded August 27, 1884. This deed, however, the plaintiff, Christopher, assailed as inoperative and void, on the ground that James M. Greer, one of the witnesses, who was present in the crowd the night the paper was signed and saw the parties sign it, yet did not actually subscribe his name to the paper as a witness until some days after, and until after the death of John H., the donor.

It was referred to the master to take the testimony and report the same, together with his conclusions thereon. He took the testimony, which is printed in the Brief, and reported: "That the written instrument sought to be established by the defendants, Thomas J. Young and Amanda M. Young, was not properly and legally executed, having but one subscribing witness; that no trust could be created in favor of Amanda M. Young; and furthermore, that said written instrument was without consideration and in favor of a stranger; that the debts of John H., amounting to over \$100, which were paid by the said Thomas J., were paid voluntarily, and the said Thomas J. had received of the rents and profits of said land more than the amounts so paid;" and recommended that the land be sold for partition.

Upon exceptions to this report, the cause came on to be heard by Judge Hudson, who overruled this report, finding and ruling as follows: "Before his death, John, being ill, called in Mr.

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Bolt and had him to prepare a deed of conveyance of his undivided half to Thomas in fee, upon special trusts for the benefit of Amanda, the wife of Thomas. This was done in the presence of half a dozen of the neighbors, one of whom held the candle. The deed in form was an indenture signed by John, the grantor, Thomas, the trustee, and Amanda, the *cestui que trust*; but from some oversight Mr. Bolt alone subscribed the deed [as a witness]. Eleven days after this John died, and shortly after this James Greer, a person present at the time of the execution, subscribed his name as a witness, and the deed was duly probated and recorded, having two subscribing witnesses' names subscribed thereto. Greer says that he did not read the deed or hear it read, but saw a paper signed by the three persons and only one paper, which must have been this deed, \* \* \* and that afterwards when requested to subscribe his name as a witness, he did so. Now, the execution of a deed must be complete before the witnesses subscribe their names. The subscription properly follows the complete execution of the deed, and need not be in the presence of the grantor or at the instant of the delivery. Their presence and observation during the process of execution is essential, but if from accident, inadvertence, or ignorance, one should omit just then and there to sign the attestation, I see no reason why he could not in a reasonable time thereafter, and before the recording of the deed, be allowed to sign and thus perfect the deed.

“Again, the deed purports on its face to be for a valuable consideration, but a very inadequate one, viz., five dollars and one dollar; nothing is said of natural love and affection. The testimony of Mr. Bolt, taken in connection with the subsequent action of Thomas J. Young, is, in my judgment, sufficient to establish the fact that the real consideration of the deed was an agreement and understanding between John and Thomas that the latter should pay off the indebtedness of the former, and this he accordingly did. This gives to the deed a valuable consideration, and in that event equity will sustain it, though signed by only one subscribing witness. Indeed, the doctrine prevails in equity that a deed upon a merely good consideration, though subscribed by but one witness, will be sustained as between the parties or their

privies in blood, as in the present case. A subsequent valuable consideration will likewise support a deed even as against creditors. *Bank v. Brown*, 2 *Hill Ch.*, 559. I am, therefore, of opinion that, as against the plaintiff, this deed must stand," &c.

From this decree the plaintiff, Christopher C. Young, appeals upon the following exceptions:

"1. For that his honor found as matter of fact that J. M. Greer saw John H. Young sign the instrument of writing set up as a deed of trust by Thomas J. Young and Amanda Young in their answers.

"2. For that his honor found as matter of fact that certain other persons saw J. H. Young sign the same instrument, which his honor found that Greer saw J. H. Young sign.

"3. For that his honor found as matter of fact that there was a subsequent valuable consideration for said instrument of writing.

"4. For that his honor found as matter of fact that the consideration for said instrument was an agreement between John H. and Thomas J. Young that the latter should pay the indebtedness of the former.

"5. For that his honor found as matter of fact that Thomas J. Young paid the debts of J. H. Young, in accordance with an agreement to that effect with J. H. Young.

"6. For that his honor found as matter of fact that there was privity of blood between the parties to the said instrument.

"7. For that his honor did not find as matter of fact that the signing and delivery of said instrument was attested only by one witness.

"8. For that his honor held as matter of law that the said instrument must stand as against the plaintiff.

"9. For that his honor decreed that the complaint should be dismissed.

"10. For that his honor further erred in so much of his decree as announces that had the said instrument not been sustained, it would have been decreed that Thomas J. Young be repaid the amount paid by him on the debts of J. H. Young."

The first seven exceptions make questions purely of fact, and as this court has often held, and very lately repeated in the case of *Pope v. Montgomery*, 24 *S. C.*, 594: "It is incumbent on the appel-

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lant to show that the conclusions of fact reached by the Circuit Judge are either without any testimony to support them or manifestly against the weight of the evidence. \* \* The utmost that can be said is, that there was conflict in the testimony, and in such case, this court rarely, if ever, interferes." We have looked through the testimony very carefully, and while we find it on some points vague and somewhat contradictory, taking it all together, we do not feel authorized to hold that any of the conclusions reached by the Circuit Judge are either wholly without evidence or against the weight of the evidence. His conclusions, therefore, must be regarded as established.

The eighth exception charges error on the part of the Circuit Judge in holding, as matter of law, that the instrument in question must stand as against the plaintiff. The view urged seems to be that the said instrument was not executed in precise accordance with the provisions of the General Statutes (section 1775) declaring legal and valid a particular form of "release" or the "purport" thereof, "If the same shall be executed in the presence of and be subscribed by two or more credible witnesses;" and in consequence of the accidental omission of one of the witnesses to subscribe his name as such at the time the deed was executed, the said instrument must be considered, as to all persons and for all purposes, as absolutely null and void as if it had never existed. Is this the correct view? It seems to us, even if the premises were conceded, that the conclusion would not necessarily follow. Without going into the question whether the facts of the case amount to a substantial compliance with the attestation law, so as to give to the deed of trust the capacity to carry the legal estate to the trustee, we cannot say that it was error in the judge to hold that it must stand as against the plaintiff.

There is no question here as to the debts of the deceased. They have been paid by Thomas J. Young. The action was not brought by a subsequent purchaser or creditor, but by a brother privy both in blood and estate. His claim as heir at law is purely technical, resting only on the alleged defect or informality as to the attestation; for if the witness Greer had signed on the night the deed was executed, there could not have been any controversy



about it. There is no doubt as to what was the intention of the parties or that they made an honest and *bona fide* effort to carry it out, and supposed they had done so. We assume, as found by the judge, "that the real consideration between John and Thomas was that the latter would pay off the indebtedness of the former, which has been done." Under these circumstances, we cannot see that the judge committed error in holding that "equity would sustain the deed, although subscribed by but one witness."

As an illustration. An instrument purporting to be a mortgage, but imperfectly executed by the omission of a seal or in some other manner, so as to be defective in form, is wholly nugatory at law as a valid mortgage, or as giving any interest in or claim upon the parcel of land described. Equity, however, not saying that the instrument is a true legal mortgage, declares that it is an efficient agreement to give a mortgage, and as such that it creates an equitable lien upon the land, valid for all purposes and as against all parties, except a purchaser of the land for a valuable consideration and without notice. 1 *Pom. Eq. Jur.*, § 380 and note. And see *Story Eq. Jur.*, §§ 165, 166; *Love v. Sierra Nevada Co.*, 32 *Cal.*, 639; *Johnson v. Gilbert*, 13 *Rich. Eq.*, 42; and *Pope v. Montgomery*, 24 *S. C.*, 594.

In *Johnson v. Gilbert*, *supra*, Chancellor Carroll, in delivering the judgment of the court, said: "The deed to Jesse Gilbert, jr., furnishes satisfactory evidence, at the least, of the executory contract for the sale of the land in fee. With a contract thus manifested and with actual possession by the vendee under it, his claim to a specific execution of the agreement could not be resisted. In this jurisdiction (equity) the vendee, under such circumstances, is treated as the equitable owner. He may transfer his interest in the land, may devise it as land, and as land it passes by descent to his heirs." *Story Eq. Jur.*, §§ 783, 789.

Can there be serious doubt that there was valuable consideration? The Circuit Judge found as matter of fact that there was, and this court has held that in a conflict between referee and Circuit Judge on a question of fact in a case in chancery, the latter is *prima facie* right. *Maner v. Wilson*, 16 *S. C.*, 469. The judge says: "The testimony as to Thomas as to the full extent of the consideration is excluded; but the testimony of Mr. Bolt,

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taken in connection with the subsequent action of Thomas J. Young is, in my judgment, sufficient to establish the fact that the real consideration of the deed was an agreement and understanding between John and Thomas that the latter should pay off the indebtedness of the former, and this he accordingly did."

It was incumbent on the plaintiff to overthrow this conclusion thus *prima facie* established. Did he do so? We think not. Leaving out the testimony of Thomas, we agree with the Circuit Judge, that all the circumstances of the case tend to confirm the testimony of Bolt. The deed says nothing about "love and affection." It mentions a small valuable consideration. It contains the usual warranty. All the parties signed, which, as we think, is not usual in simple deeds of gift. The debts were actually paid before the action was brought, and we fail to see the evidence to authorize the very general statement of the master, that "Thomas had received of the rents and profits more than the amount so paid." While the board, attention, washing, and nursing must go for nothing as gratuitous, we are not willing to assume that the payment of the debts was also gratuitous and voluntary. In *Pope v. Montgomery, supra*, it was held that "an informal paper, purporting to be an assignment of the maker's interest in a tract of land, witnessed by only one witness, but based upon a valuable consideration, is sufficient in equity to transfer such interest, and a proper conveyance could be enforced."

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

MR. CHIEF JUSTICE SIMPSON concurred.

MR. JUSTICE McIVER, *dissenting*. I regret to say that I am unable to concur in the conclusion reached in the opinion prepared by Mr. Justice McGowan. I propose, therefore, to indicate briefly the grounds of my dissent, as want of time forbids anything like an extended discussion of the questions involved.

It seems to me clear that the paper set up by respondents as a deed is fatally defective, as lacking one of the statutory requirements—two subscribing witnesses—necessary to the validity of such a paper. I do not see how Greer can, under any proper view of the matter, be regarded as such a subscribing witness as

is contemplated by the statute. At the time the paper was signed he certainly was not called upon to act as a subscribing witness, nor did he put his name to the paper until after the death of the alleged grantor. He was a mere by-stander, a casual observer, along with several others, and when examined as a witness in this case he said: "I did not see the parties sign, seal, and deliver the deed. Saw them sign some paper, but don't know that this is the paper. Saw them sign a paper when Mr. C. Bolt was there. I wasn't in the house: was standing in the door. Don't know as I saw them sign but one paper when Mr. Bolt was there. Never saw them sign but one paper when Mr. Bolt was there; this must be the paper." When he was asked by T. J. Young, the nominal grantee, after the death of the alleged grantor, to sign the deed as a subscribing witness, he says: "I just signed the deed to accommodate T. J. Young; thought there would be no hereafter about it; didn't pay much attention to it."

It seems to me that it would be a perversion of terms to characterize this witness as such a subscribing witness as is required by the statute. One of the objects of requiring subscribing witnesses is to identify the paper, and here it is manifest that the witness, Greer, could not identify the paper which he saw signed with the paper which he signed as a witness, except by a process of reasoning, which, to say the least of it, is not very satisfactory when we see from the testimony that he was not called upon to pay any attention to what was going on, and when he did not, in fact, do so, "wasn't in the house; was standing in the door," evidently not expected or expecting to act as a witness, and therefore not observing what was going on. Hence he very properly testifies that while he saw some paper signed, he could not say that it was the paper offered as a deed in this case; and the fact which he adds, that he "never saw them sign but one paper when Mr. Bolt was there," is very far from proving that there was no other paper signed.

But, in addition to this, the undisputed testimony is that Greer never put his name to the paper until after the death of the alleged grantor, and in this respect the case differs very materially from the case of *Pope v. Montgomery* (24 S. C., 594), where, however, the point was not decided. There the alleged

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deed, after having been signed by the grantor in the presence of a single subscribing witness, was afterwards acknowledged by the grantor, in the presence of the same witness and another, who then subscribed his name as a witness; while here the second witness never subscribed his name as such until after the death of the alleged grantor. So that even assuming that a paper executed in the manner described in *Pope v. Montgomery*, would become a valid deed from the time it was signed by the second witness, and acknowledged by the grantor in his presence, and in the presence of the other subscribing witness, it does not by any means follow that a paper signed as the one here in question was, would become a valid deed. It certainly was not such at the time of the death of the alleged grantor, for it was then signed by only one subscribing witness, and it is not easy to perceive how it could acquire the qualities of a valid deed after his death, and certainly not by the act of the nominal grantee in procuring another person to sign as a subscribing witness.

But it is urged, that even supposing that the paper propounded as a deed was invalid as such, yet equity, regarding it as an agreement to convey will enforce such agreement and practically give it the effect of a conveyance, or that it will correct the mistake made by the omission of, what is termed, one of the necessary formalities. I do not understand distinctly upon which of these grounds it is proposed to rest the decision. If the latter, then it seems to me there is an utter lack of any testimony to support it. The Circuit Judge, in his decree, does say that "from some oversight Mr. Bolt alone subscribed the deed as a witness," and, in the opinion of the majority of this court, the omission of one of the witnesses to sign is spoken of as an "accidental omission"; but I am unable to discover any testimony even tending to show that such omission was the result of either oversight or accident. On the contrary, the testimony tends to show that what was done, was done deliberately and purposely, and that nothing was omitted which was intended to be done. The testimony fails to show the slightest reason to suppose that the parties ever intended to have two subscribing witnesses, and that such intention was frustrated by any sudden change in the condition of the alleged grantor, then lying upon what proved to be his death-bed,

or any other circumstance. There was no lack of persons present to act as subscribing witnesses, if an additional one was wanted, and it is difficult to conceive of any reason for the omission, except that it was not deemed necessary. The fact that the paper was formally acknowledged by the parties in writing before a notary public, tends to show that the parties regarded that as a sufficient mode of authenticating the paper, and hence they did not deem it necessary to have, and did not intend to have, two subscribing witnesses. The omission clearly was the result of ignorance of the law merely, and was not the result of any mistake or accident, and hence the second ground upon which it is proposed to uphold the paper as a deed cannot be sustained.

More reliance, however, seems to be placed upon the first ground—that equity will regard the paper as a valid agreement to convey, and give it the effect of a conveyance. This depends, in my judgment, upon the result of the inquiry whether the agreement is voluntary or is based upon a valuable consideration. I understand the rule to be that equity will not require the specific performance of a merely voluntary agreement, but that it will do so where the agreement is based upon a valuable consideration, provided certain conditions exist which need not here be adverted to. The Circuit Judge cites 1 *Story Eq. Jur.*, §§ 165, 166, and 1 *Fonbl. Eq.*, Bk. 1, Ch. 1, § 7, to show that in equity “a deed upon a merely good consideration, though subscribed by but one witness, will be sustained, as between the parties or their privies in blood.” An examination of these authorities will show that the expression “good consideration,” is not used in contradistinction to, but as identical with, *valuable* consideration. The expression is not used in either of the sections cited from Story, but it is used in the section cited from Fonblanque as follows: “Equity regards not the outward form, but the inward substance of the matter, which is the agreement of the parties upon a good and valuable consideration.” And in a note to this passage the following language is found: “Though equity will relieve by supplying the defects of a conveyance upon a good or valuable consideration, yet it will not, if the conveyance be purely voluntary.” This shows that the expression “good consideration” is not used

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in contradistinction to "valuable consideration," but simply means a consideration *good* in law.

That this was the view of Mr. Justice Story may be seen by numerous passages in his great work. In section 176, he says: "But in all these cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief must stand upon some equity, superior to that of the party against whom he asks it. If the equities are equal, a Court of Equity is silent and passive. Thus equity will not relieve one person, claiming under a voluntary defective conveyance, against another, claiming also under a voluntary conveyance, but will leave the parties to their rights at law." Again, in section 793a, this writer says: "We have already had occasion to remark, throughout the whole of the preceding discussion, respecting bills for specific performance of contracts, that it has been constantly supposed that the contract was one founded upon a valuable consideration in the contemplation of law. In respect to voluntary contracts, or such as are not founded in a valuable consideration, we have already had occasion to state that Courts of Equity do not interfere to enforce them, either as against the party himself, or as against other volunteers claiming under him. Thus, for example, if a party should enter into a voluntary agreement \* \* to convey \* \* \* certain real estate Courts of Equity would not assist in enforcing the agreement, either against the party entering into the agreement or against his personal representatives, for the party contracted with is a mere volunteer. The same rule is applied to imperfect gifts \* \* \* and to voluntary defective conveyances." See also the various sections therein cited.

It seems to me clear, therefore, that unless the paper propounded as a deed, under which respondents claim, was founded on a valuable consideration, it cannot be given, even in equity, the effect of a conveyance. Whether there was such valuable consideration is a question of fact upon which the master and the Circuit Judge differ. It appears to me, after a careful examination of the evidence, that there is but little, if any, testimony to show that the alleged deed was founded upon a valuable consideration, and, therefore, I think the conclusion of the master rather than that of the Circuit Judge should be adopted. The con-

sideration claimed as the foundation of the deed is of a twofold character. 1st. The services alleged to have been rendered to the deceased, John H. Young, by the defendant, Amanda M. Young, in his life time. 2nd. The alleged agreement of the defendant, Thomas J. Young, to pay the debts of the deceased.

As to the first, after striking out the testimony of Amanda M. Young as to her transactions with the deceased, which was not only clearly incompetent, under section 400 of the Code, but was ruled so to be both by the master and the Circuit Judge, it is manifest that there is not a shadow of testimony tending to show that Mrs. Young had any such claim against deceased for services rendered, as would constitute a valuable consideration for the deed. The testimony of Bolt, when he was re-called, so far from supporting this view, tends the other way. He says that "when I drew up the paper, J. H. Young spoke of the kindness of Mrs. A. M. Young, and said he did not know how he could have got on without her. \* \* \* He spoke very gratefully of Mrs. A. M. Young's kindness." Now, there is not only a significant absence of anything in this testimony tending to show that J. H. Young either expected or intended to pay for this kindness, but, on the contrary, the language used much more naturally conveys the idea that he was thankful for this gratuitous service. People do not usually characterize services rendered for pay as a kindness, which calls for expressions of gratitude. It seems to me that the testimony shows that such services as were rendered the deceased by Mrs. Young were prompted by a feeling of kindness for her husband's afflicted brother, and without any expectation or intention on the part of either that they should be paid for; and, therefore, however commendable it may have been on the part of Mrs. Young thus to administer to the wants of one so closely connected with her, and living in the house with her, it affords no foundation for any such legal claim as would constitute a valuable consideration for the deed. That which was intended as a gratuity cannot afterwards be converted into a charge.

The second ground upon which it is urged that there was a valuable consideration for the deed, is the alleged agreement on the part of Thomas J. Young with J. H. Young to pay the debts of the latter. This is also without the slightest foundation in the evi-

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dence, after the testimony of Thomas J. Young, which was clearly incompetent, as to this point, and ruled so to be, is stricken out. Bolt, the witness who drew the paper, and who would most naturally know what occurred, does not speak of any such agreement. Nothing of the kind is inserted in the alleged deed, and Bolt says that he drew the paper "in accordance with his wishes and desires." This witness, when recalled a second time, says that *he* told deceased a *deed of gift* would not hold good as long as he owed debts, "and he said that T. J. Young would, of course, have them to pay. \* \* \* I mean by the deed of gift the deed I drew up and witnessed."

Now, this testimony not only shows that the deceased never made any allusion to the payment of his debts until his attention was directed to it by the witness, but it also shows that the paper was intended and understood to be a deed of gift, and was so designated at the time of its execution, and the further statement that such a paper would not hold good until the debts were paid, only goes to confirm my view that the paper in question was not, in fact, based upon a valuable consideration, and was not intended to be so, but was intended to be just what it was called at the time—a deed of gift—and the advice given by the scrivener that it would not hold good until the debts were paid, while, to a certain extent, very appropriate to a deed of gift, would have been wholly inapplicable to a deed based upon a valuable consideration. For if the deed had been properly executed, and was voluntary, while it would not have been good as against the creditors as long as the debts were unpaid, it would have been good as between the parties and their heirs; whereas if the deed had been founded upon a valuable consideration, it would have been good against creditors as well as heirs.

Again, it is urged that even if there was no valuable consideration at the time the deed was executed, yet there was a subsequent valuable consideration in the actual payment of the debts of J. H. Young by T. J. Young subsequent to the death of the former, which would be sufficient to support the deed even against creditors; and the case of *Bank v. Brown*, 2 Hill Ch., 558, is cited to sustain that view. In that case a husband, while in debt, made a deed, in form voluntary, settling on his wife certain



property. The husband was at the time negotiating the sale of certain real estate acquired by his wife, which sale was afterwards made. Upon a bill by the creditors of the husband to set aside the deed of settlement as voluntary, parol evidence was received to show that the real consideration of the deed of settlement was the renunciation by the wife of her inheritance on the sale of the land acquired by the husband through her; and this constituted a valuable consideration for the deed of settlement sufficient to support it as against the claims of creditors. It is not easy to perceive how the decision in that case applies to the question involved here. The negotiation for the sale of the wife's land was going on at the time the apparently voluntary deed of settlement was made, and if the testimony showed that the wife was induced to renounce her inheritance by the expectation that she would be provided for by the deed of settlement, that could scarcely be properly called a subsequent valuable consideration, even though the execution of the deed of settlement did precede the actual renunciation of the wife's inheritance.

But even conceding that the consideration was subsequent, I do not perceive the application of that case to this. Here the proposition is, that although the deed may have been voluntary in the first instance, yet it has subsequently acquired the character of a deed resting on a valuable consideration by reason of the fact that the grantee has subsequently paid voluntarily, or been made to pay, debts of the grantor. While I do not propose to discuss, I am not prepared to concede, the correctness of this proposition. For the deed, if properly executed, even though purely voluntary, would be perfectly good as between the parties and their heirs—the parties here contending—and it would only be assailable by creditors. Now, if the deed was originally perfectly good and valid between the parties here contending, I do not see how it could be made any better, *as between such parties*, by the fact that those claiming under it have been compelled to pay, or have voluntarily paid, third persons debts held by them against the grantor.

But, waiving this, it seems to me that the fundamental fact upon which this proposition rests, to wit, that Thomas J. Young has subsequently paid the debts of J. H. Young, the alleged

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grantor, has not been established. On the contrary, the master finds, and the testimony fully sustains his finding, that the payment of the debts of J. H. Young by T. J. Young was voluntary, and that he had received from the rents and profits an amount more than sufficient to pay said debts. It cannot be properly said that T. J. Young has paid anything towards the debts of J. H. Young, but he has simply applied money coming into his hands which belonged to the estate of J. H. Young to the payment of such debts.

It seems to me, therefore, that in no view of the case can the paper, purporting to be a deed, under which respondents claim, be supported, and, on the contrary, I concur in the findings of the master, both of fact and law, and think the plaintiff is entitled to have partition of the land.

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MACAULAY v. CENTRAL NATIONAL BANK.

1. In action by the beneficiaries under a policy of life insurance against a bank for the possession of the policy, conversations and transactions by the president and cashier of the bank with the assured, since deceased, are not incompetent testimony against the plaintiffs under section 400 of the Code.
2. Where a policy of life insurance was payable on the death of the assured to R., the wife of the assured, and to C. and J., his children, share and share alike, or their legal representatives, the parties named took a vested interest; and upon the death of J. in infancy, in the life-time of the assured, his share was divisible under the statute between his distributees, including his father, the assured.
3. The interest thus derived of the assured in this policy, might be verbally pledged by him as collateral security for the payment of a debt.
4. Matters not excepted to on Circuit are not properly before this court for review.

Before FRASER, J., Richland, April, 1886.

At the hearing of this appeal Judges Witherspoon and Norton sat in the places of the Chief Justice and Mr. Justice McGowan.

This was an action by Rachel T. Macaulay and Christina E. Macaulay against the Central National Bank.

The policy of insurance in this case recited that in consideration of \$282.70 to the company, "paid by Rachel T., wife of Allan Macaulay—for the benefit of herself and Christina E. and John T. Macaulay, his children, share and share alike," and of the payment of a like sum for nine successive years, the life of Allan Macaulay was insured. And the company agreed to pay, upon the death of said Allan, the sum of \$5,000 "to the said Rachel T., Christina E., and J. T. Macaulay, share and share alike, or their legal representatives." The policy was issued in July, 1866, and John T. Macaulay died in December, 1866, at the age of sixteen months.

The cashier and president of the bank testified that Allan Macaulay had pledged this policy in 1884 to the defendant bank as collateral security for over-drafts; that he frequently, in subsequent conversations, recognized it as a pledge. This testimony was objected to and excepted to by plaintiffs.

At the close of the testimony the judge said it was impossible to proceed with the case, unless the administrator of Allan Macaulay was made a party to this action. The following agreement was then entered into:

"We hereby agree and consent, for the purposes of this trial, that it shall proceed to its determination as if an administrator of Allan J. Macaulay's estate had been duly appointed and qualified, and entered upon the discharge of his duties, and that he had been made a party defendant to this proceeding, and before the court."

The judge charged the jury as follows: This is a suit for the possession of a policy of insurance, taken out by Rachel Macaulay, wife, on the life of Allan Macaulay, for the benefit of herself and two children, Christina E. and John T. Macaulay. The plaintiffs only sue for \$850. This is the balance that is held and claimed by the defendant, to pay an overdraft due by Allan Macaulay to the defendant, in amount \$681.97. It is the duty of the court to construe this policy. I charge you that when John T., the infant, died he had a vested interest which went immediately to his distributees. No question being raised as to the statute of distributions of New York, it must be governed by the statute of our State. Under our statute the father took half of

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the child's share, and the other half went to his sister, Christina E. The mother took no part of the child's share. The words "legal representatives" in this contract mean the executors or administrators. When the child died, its father being a distributee was entitled to half of the child's share.

The judge also granted certain requests to charge of the defendant and refused certain requests of the plaintiffs, but so far as this court was called upon to review them, they are sufficiently stated in plaintiffs' grounds of appeal, which were as follows :

1st. Because, it is respectfully submitted, that his honor erred in admitting in testimony the evidence of J. H. Sawyer in regard to transactions and conversations had with Allan Macaulay, during his life-time, concerning the policy sued on in this action.

2d Because, it is respectfully submitted, that his honor erred in admitting the testimony of W. B. Stanley in regard to transactions and conversations had with Allan Macaulay during his life-time, concerning the policy sued on in this action.

3d. That his honor erred in his charge to the jury, that is, "that when John T. Macaulay, the infant, died, he had a vested interest which went to his heirs-at-law ;" and the father being one of said infant's heirs was entitled to an interest of the child's share.

4th. Because his honor refused to charge the jury, "that the child, John T. Macaulay, had an interest when this policy was taken out, but from the construction of this policy this interest, at his death, went to his mother and sister (the other beneficiaries named therein)."

5th. Because his honor refused to charge the jury, "that neither Allan Macaulay nor his administrator had any interest in said policy."

6th. Because his honor refused to charge the jury, "that if Allan Macaulay inherited any interest in the policy, that interest would not vest in him (so as to be assignable) until the appointment of an administrator of John T. Macaulay."

7th. Because his honor refused to charge the jury, "that if Allan Macaulay inherited an interest in said policy, he could not assign that interest verbally, but it must be done in writing."

8th. Because, from the nature of this policy, it being a fund

for the wife and children after the death of the husband and father, neither the father nor his administrator had any interest therein, but the interest of the infant that died went to the other beneficiaries named in said policy.

*Mr. John McMaster*, for appellants.

*Mr. John T. Sloan, jr.*, contra.

July 19, 1887. The opinion of the court was delivered by

MR. JUSTICE WITHERSPOON. On July 27, 1866, the New York Life Insurance Company, in consideration of a certain amount of premium then paid by Rachel T. Macaulay, and the further payment of a similar amount on the first day of July of each succeeding year for nine years, issued a policy for \$5,000, upon the life of Allan Macaulay, husband of the said Rachel T., in which policy said company agreed to pay, upon the death of the said Allan Macaulay, the sum assured, "to the said Rachel T., Christina E., and J. T. Macaulay, share and share alike, or their legal representatives." Christina E. and J. T. Macaulay, named in said policy, were children of Allan and Rachel T. Macaulay. J. T. Macaulay (hereinafter referred to as John T. Macaulay), one of said beneficiaries named in said policy, died in infancy during the month of December, 1866, after said policy was issued. The last premium due on said policy was paid in 1876.

Allan Macaulay was a member of the firm of Stenhouse & Macaulay, cotton brokers, and the defendant furnished said firm with money to buy cotton. It appears that said firm owed the defendant by over-drafts October 3, 1884, the sum of \$687.01. Allan Macaulay died December, 1884. Prior to his death, Allan Macaulay deposited the policy of insurance aforesaid with the defendant, as defendant claims, under an agreement with defendant, that said insurance policy should be held by defendant as a pledge for the payment of the over-drafts due by Stenhouse & Macaulay as aforesaid. After the death of Allan Macaulay the plaintiffs demanded the policy, and defendant refused to deliver the same until the indebtedness of Stenhouse & Macaulay by over-drafts, as aforesaid, was paid to said defendant. The plain-

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tiffs instituted the above entitled action to recover the possession of the life insurance policy aforesaid, together with damages for the alleged unlawful withholding of the same by defendant.

The defendant interposed a demurrer to the complaint: I. Because it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action. II. Because there is a defect of parties plaintiffs, in the omission of the names of the legal representatives of Allan Macaulay and John T. Macaulay. The demurrer was overruled. The defendant was allowed to answer, and, under an order of court, defendant turned over the insurance policy to plaintiffs, and plaintiffs deposited \$850 of the proceeds thereof with the clerk of court, to await a final decision of the case, as required by said order. No exception was taken to the order overruling defendant's demurrer.

Under these circumstances, and at a subsequent term of court, the cause came on to be heard by Judge Fraser and a jury. The jury rendered a verdict for plaintiffs for \$360.53. After referring to the former order in the cause requiring the deposit by plaintiffs of \$850 with the clerk, the presiding judge passed an order directing the clerk to pay defendant \$189.47, and to plaintiffs the balance of the fund in his hands, on account of the judgment to be entered up in this case. From this order and the rulings and charge of the Circuit Judge the plaintiffs appeal.

The first and second exceptions allege that the Circuit Judge erred in admitting the testimony of W. B. Stanley, president, and J. H. Sawyer, cashier, of the Central National Bank, the defendant, as to transactions and communications with Allan Macaulay, deceased, with reference to the policy sued upon. These exceptions are taken and are to be considered under section 400 of the Code. Plaintiffs are not prosecuting this action in any of the representative capacities referred to in said section, and we fail to see any ground upon which said exceptions can be sustained.

The third exception alleges that his honor erred in charging the jury, "that when John T. Macaulay, the infant, died he had a vested interest which went to his heirs-at-law, and the father being one of said infant's heirs, was entitled to an interest of the

child's share." This exception raises the *real issue* between the parties to this action, to wit: the effect of the death of the infant beneficiary, John T. Macaulay, on his share or interest in the policy; that is to say, whether such interest *survived* to the other beneficiaries, as contended by plaintiffs, or went to the deceased distributees, as contended by defendant. In construing the policy under consideration, the Circuit Judge charged the jury in substance, that the policy when delivered, and the money to become due under it, belonged to the beneficiaries named in the policy, and the interests of said beneficiaries then became vested, subject to be defeated only by the non-payment of future premiums; that when John T., the infant, died he had a vested interest, which went immediately to his distributees; that the words "legal representatives" in the policy meant executors and administrators. The judge left to the jury to decide, as matter of fact, whether or not Allan Macaulay assigned, pledged, or delivered the policy to the defendant, to secure the over-drafts due said defendant by Stenhouse & Macaulay.

In support of the third exception, appellants' counsel cites the case of *Robinson v. Duvall*, decided by the Court of Appeals of Kentucky in 1881; see *The Reporter*, vol. XII., page 466. In that case the sum assured, under the terms of the policy, was payable to the wife and children, or their legal representatives. The court held in that case that upon the death of a beneficiary, his share passed to the surviving beneficiaries. We do not think that the case cited and relied upon by appellants is applicable, as there is a material difference between the provisions of the policy in that case for the beneficiaries, and the policy under consideration. The policy under consideration provides for the payment of the sum assured to certain persons by name, "share and share alike, or their legal representatives." We think that this provision in the policy, under consideration, excludes the theory of survivorship among the beneficiaries, contended for by appellants, and that the Circuit Judge did not err in his charge to the jury as alleged in the third exception.

Plaintiffs requested the judge to charge the jury to the effect, that neither Allan Macaulay nor his administrator could take any interest under the terms of the policy, and that the interest

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of the infant, John T., at his death, went to plaintiffs, the other beneficiaries named in said policy. The fourth, fifth, sixth, and eighth exceptions allege that the judge erred in refusing to charge as requested. The seventh exception alleges that the judge erred in refusing to charge as requested, "that if Allan Macaulay inherited an interest in said policy, he could not assign that interest verbally, but it must be done in writing." This exception cannot be sustained. We do not think that the Circuit Judge erred, either in his charge, or in refusing to charge the jury as alleged in plaintiffs' exceptions. The matter of administration upon the estate of the deceased beneficiary, John T. Macaulay, referred to in appellants' argument, was disposed of in the Circuit Court, without exception, and cannot be considered by this court.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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BUTLER v. WILLIAMS.

1. The personal representative of a deceased mortgagor is not a necessary party to an action to foreclose the mortgage. The demand for judgment for deficiency does not affect the question, as the prayer for relief constitutes no part of the complaint.
2. Where a mortgagor assigned all of his estate to an assignee for the benefit of his creditors, and then died, his heirs-at-law are not necessary parties to an action of foreclosure.

Before HUDSON, J., Charleston, March, 1887.

This was an action by the executor of Hannah Enston against the heirs of Daniel H. Silcox and others. The opinion states the case.

*Messrs. T. M. Mordecai and Smythe & Lee*, for appellants.

*Messrs. Hayne & Ficken*, contra.

July 19, 1887. The opinion of the court was delivered by



MR. JUSTICE McIVER. This action was originally commenced by Hannah Enston for the purpose of foreclosing two several mortgages on real estate against Daniel S. Silcox in his own right and as administrator of his late father, Daniel H. Silcox, and the other heirs-at-law of said Daniel H. Silcox. In the complaint it was alleged that the said Daniel H. Silcox, being indebted by his bond to the said Hannah Enston in the sum of ten thousand dollars, executed a mortgage to her for the purpose of securing the payment of said bond, on two lots in the city of Charleston—one on Franklin street and the other on King street; that subsequently the said Daniel S. Silcox executed his mortgage to the said Hannah Enston on a certain lot in the city of Charleston, on Archdale street, to secure the payment of the same bond, and that in consideration of this last mentioned mortgage, the said Hannah Enston released the lien of the first mentioned mortgage on the lot on King street. The complaint also alleged the death of Daniel H. Silcox, upon whose estate the said Daniel S. Silcox had duly administered, and that he, together with the other parties named as defendants in the original complaint, were the heirs-at-law of said Daniel H. Silcox, and demanded judgment for the foreclosure and sale of the two mortgages—the one on the Franklin street lot, executed by D. H. Silcox, and the other on the Archdale street, executed by D. S. Silcox, and also that D. S. Silcox, as administrator of D. H. Silcox, might be adjudged to pay any deficiency that may remain due on the mortgage debt after the proceeds of the sale of the mortgaged premises shall have been applied thereto. The said Daniel S. Silcox answered this complaint, admitting the allegations thereof, except that the amount due on the mortgage debt had been reduced by a large payment made by him subsequent to the commencement of the action.

After the commencement of this action, and after the filing of the notice of *lis pendens*, the said Daniel S. Silcox executed a deed of assignment whereby he conveyed and transferred his entire estate, both real and personal, to Daniel S. Silcox, jr., in trust for the benefit of his creditors, and soon thereafter the said Daniel S. Silcox died intestate, and letters of administration upon his estate were duly granted to his widow, Carrie O. Silcox.

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Thereupon a supplemental complaint was filed against the surviving defendants in the original complaint, and against Daniel S. Silcox, jr., as assignee of Daniel S. Silcox, deceased, and Carrie O. Silcox, as widow and administratrix of the said Daniel S. Silcox, deceased. To this supplemental complaint the said Carrie O. Silcox, as widow and administratrix as aforesaid, and the said Daniel S. Silcox, jr., as assignee as aforesaid, demurred upon two grounds: 1st. Because there is no legal representative of the estate of Daniel H. Silcox, deceased, a party defendant to the action. 2d. Because the heirs-at-law of Daniel S. Silcox, deceased, are not parties defendants. Pending the action Hannah Enston died, and the action has been continued in the name of the plaintiff as her executor. The Circuit Judge overruled the demurrers, and this is an appeal from his ruling in that respect.

The first ground raises the question whether the personal representative of a deceased mortgagor of real estate is a *necessary* party to an action to foreclose such mortgage. The authorities clearly show that when the mortgagee will be satisfied with only the partial relief afforded by a foreclosure and sale of the mortgaged premises, and does not claim a judgment for any deficiency that may remain unpaid after the application of the proceeds of the sale of the mortgaged premises, the personal representative is not a *necessary* party. In *Story Eq. Plead.*, sec. 175, the author, after alluding to the doctrine that "a Court of Equity delights to do complete justice, and not by halves," says: "Notwithstanding the apparent reasonableness of this doctrine, it is not a little remarkable that Courts of Equity have refused to act upon it, where a mortgagee brings a bill to foreclose the mortgage against the heir of the mortgagor; for in such a case it has been held that although the mortgage is primarily a debt, charged upon the personal assets, yet it is not necessary to make the personal representative of the mortgagor a party. For it is said the mortgagor is not in any way bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit of having the personal estate applied in exoneration of the real, he must enforce that right by filing a bill." This doctrine is still more emphatically asserted by the

same author in the subsequent discussion of the subject in section 196.

The same doctrine is fully recognized in *Pomeroy Rem.*, sections 336-7, and by our own cases, both before and since the adoption of the code. *Wright v. Eaves*, 10 *Rich. Eq.*, 582; *Bryce v. Bowers*, 11 *Rich. Eq.*, 41; and *Trapier v. Waldo*, 16 *S. C.*, 276. The inference sought to be drawn by the counsel for the appellant from some of the language used in the case last cited, that the heirs of the mortgagor may, *by demurrer*, require the plaintiff to bring in the personal representative of the deceased mortgagor as a party defendant, cannot be sustained. In that case the question was whether a purchaser at a foreclosure sale could refuse to comply upon the ground that the personal representative of the deceased mortgagor had not been made a party to the action for foreclosure. That, of course, involved the inquiry whether such personal representative was a *necessary* party; for if he was, then the purchaser would be justified in refusing to comply, otherwise he would not. The decision was, that he was not a *necessary* party—the language in which it was announced being as follows: “Whilst the practice in the foreclosure of mortgages, above indicated, is the proper one, and especially useful for the mortgagee, as giving him complete justice, is he obliged to conform to it on pain of invalidating the whole proceeding, even as to the sale of the mortgaged premises? Would not the proceeding be maintainable, at least to carry title to the land, if, giving up the remainder of his debt, he should go for a strict foreclosure on the land alone? *In such case the personal representative of the mortgagor would not be a necessary party.*”

Then follows the language relied upon by counsel for appellant as follows: “We can very well see how such a proceeding might fail to afford full remedy to the mortgage creditor, and how the heirs of the mortgagor, having the right to push the debts over on the personalty, might object to it; but if neither creditors nor heirs made objection, we do not see how the purchaser of the land could do so.” It is very manifest that this language was not designed to convey the idea, or even to intimate, that the personal representative was a *necessary* party to an action for strict

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foreclosure, and where no judgment for the deficiency was asked for. On the contrary, such an idea is distinctly, and in express terms, negated by the language italicized by us in the foregoing quotation. Its purpose, manifestly, was simply to intimate that the heirs might, by *proper proceedings*, and upon a proper showing, require the personal representative to be brought in, but not that his absence would constitute ground for *demurrer* for defect of parties. It is clear that a demurrer on that ground can only be sustained where there is a deficiency of *necessary*, not *proper* parties merely; for the demurrer is necessarily based upon the idea that the court cannot proceed to render *any* decree because of the absence of some party necessary to the validity of such decree. But where the person not brought before the court is merely a *proper*, but not a *necessary*, party, there is no ground for a demurrer for defect of parties. All the authorities show that while the personal representative of the deceased mortgagor is a *proper* party to an action for foreclosure of a mortgage of real estate, and, if a decree for the deficiency is desired, should be made a party; yet, as he is not a *necessary* party, his absence does not preclude the court from proceeding to render a decree for foreclosure and sale.

It is urged, however, that in the complaint there is a demand for judgment for the deficiency, and therefore the personal representative of the deceased mortgagor was a necessary party. But, when it is remembered that the demand for relief constitutes no part of the complaint (*Balle v. Moseley*, 13 S. C., 439), we do not see how this can affect the question. The court renders judgment appropriate to the case made by the complaint and established by the proofs, without regard to the prayer for relief, and when the case so made is such as to entitle the plaintiff to any relief, we do not see how a demurrer could be sustained.

We think it clear, therefore, that the first ground of demurrer cannot be sustained.

As to the second ground, much of what has already been said applies to this. It will only be necessary, therefore, to cite a few authorities to show that the heirs at law of the deceased mortgagor, Daniel S. Silcox, were not necessary parties, inasmuch as he had, during his life-time, "assigned all of his estate, both real

and personal, for the benefit of his creditors, to the defendant, Daniel S. Silcox, jr." See *Story Eq. Pl.*, § 197; *Pom. Rem.*, § 336; *Wright v. Eaves*, 10 *Rich. Eq.*, 582, and *Bryce v. Bowers*, 11 *Id.*, 41. The suggestion that it does not appear whether the assignment by Daniel S. Silcox to Daniel S. Silcox, jr., was of the life-estate only of the former or of the fee, besides being based solely on conjecture, is inconsistent with the facts stated in the complaint, which, upon demurrer, are to be taken as true. It is there stated that Daniel S. Silcox assigned "all of his estate," and if that was so, there could be nothing left to descend to his heirs at his death, and they were, therefore, not necessary parties, as it does not appear from the pleadings that, at the time the action was commenced or at the time of the filing of the supplemental complaint, they, either as heirs of their deceased father, or otherwise, had any title to or interest in the mortgaged premises. If, in fact, they did have such title or interest, it was incumbent on the appellants to make it appear, and this could not be done by demurrer.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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LITES v. ADDISON.

1. A party may take such exceptions to a charge as he pleases, and neither the opposing party nor the Circuit Judge can amend those exceptions. Hence it follows, that matters which appear only in the exceptions, are not otherwise a part of the case, and cannot be considered by this court.
2. Where the maker of a past due note was asked by one about to purchase it whether it was all right, and the maker replied that he had given the note, that it was all right and he expected to pay it in January, such maker cannot afterwards defeat a recovery thereon by such purchaser upon the ground of failure of consideration.
3. The representation thus made was not of something in the future, nor the mere expression of an opinion; nor can it be said to have been made in ignorance of the facts, because that further time was necessary to determine whether the consideration of the note would answer the purpose for which it was intended.

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4. A representation by the maker of the validity of a past due note will work an estoppel in favor of the purchaser, acting under such representation, even though it was made without intent to deceive.
5. Estoppel need not be specially pleaded—certainly not as to a defence which is set up in an answer that requires no reply.

Before FRASER, J., Abbeville, November, 1886.

This was an action by Joel W. Lites and D. J. Wardlaw against W. P. Addison. The opinion sufficiently states the case.

*Messrs. Parker & McGowan*, for appellant.

*Messrs. Cason & Bonham*, contra.

July 19, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This was an action on a note, dated June 24, 1885, payable one day after date, to A. A. Traylor, for two hundred and seventy-five dollars, given by the defendant; the plaintiffs claiming that the note had been duly transferred to them for value. The execution of the note was admitted and the defence set up was failure of consideration. The defendant having admitted the plaintiffs' case, became the actor and undertook to establish his affirmative defence. For this purpose he offered testimony tending to show that in June, 1885, he contracted with Mrs. Lyon, through her husband and agent, for the purchase of a jackass, warranted to be sound and suitable for the purpose for which such animals are usually wanted, at the price of four hundred and fifty dollars, and gave her his note for that amount. A few days afterwards Mrs. Lyon, being indebted to Traylor in the sum of two hundred and seventy-five dollars for the purchase of two horses, as was alleged, proposed to defendant to divide his note into two notes, so that she might thereby settle her indebtedness to Traylor. To this proposition defendant assented, and accordingly took up his \$450 note and gave instead thereof two notes—one to Mrs. Lyon for one hundred and seventy-five dollars, and the other to Traylor directly for the balance, the latter being the note upon which this action was brought. Subsequently, and after this note became due, Traylor duly trans-

ferred the note to plaintiffs for value received of them in the purchase of a house in McCormick.

Some time in the fall of 1885 (but at what particular time is not stated), the plaintiffs, with a view to the trade with Traylor, applied to the defendant to know whether he had given the note, and whether it was all right, to which defendant replied that he had given the note, that it was all right, and that he expected to pay it the first of January. Upon this information the plaintiffs traded for the note. It also appeared that when suit was commenced on the \$175 note, the animal was returned to Mrs. Lyon on account of his unsoundness, or rather his unfitness for the purpose for which he was wanted, the suit was withdrawn and Mrs. Lyon resold the animal to another party. It may be assumed for the purposes of this appeal that the following facts were established: that the real consideration of the note sued on was the purchase money in part of the jackass, and that there was a failure of consideration, leaving as the only seriously contested question the effect of the statements made by the defendant to the plaintiffs when they, in contemplation of the trade with Traylor, approached him upon the subject.

The Circuit Judge instructed the jury as to this substantially as follows: That if they believed the testimony as to what passed between the plaintiffs and defendant in regard to the note before it was purchased, then the defendant has thereby estopped himself from pleading a failure of consideration as against these plaintiffs. To use the language of the Circuit Judge, speaking of the defendant: "If he induced somebody else to pay valuable property, the maker of the note would be estopped. \* \* \* I charge you that if the defendant in this case, after the note became due, misled the purchaser of that note, and made no reservation at all as to any expectations of unsoundness, he cannot now set up that defence." The jury having found for the plaintiffs the full amount of the note, the defendant appeals upon the several grounds set out in the record, as follows:

I. Because his honor refused to charge defendant's request, viz., "That if the consideration of the note sued on was part of the purchase money of the jackass sold to defendant, and the plaintiffs received it after due and the consideration has failed,

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the defence of failure of consideration, if proved to the satisfaction of the jury, must prevail, and the verdict must be for the defendant."

II. Because his honor refused to charge the request of defendant: "That the mere statement that the note was a good note, and that he expected to pay it in January, did not estop the defendant from pleading failure of consideration. That to estop defendant the declarations used must have been intended to deceive the plaintiffs, and that if defendant spoke the truth in reply to a question asked, he is not estopped."

III. Because his honor charged "as matter of law, that under the evidence the defendant was estopped from setting up failure of consideration."

IV. Because estoppel, if relied upon by plaintiffs, should have been specially pleaded, or notice of such defence given to defendant, so that he would not be taken by surprise.

V. Because the question should have been submitted to the jury whether there was any intentional misrepresentation by defendant to plaintiffs, or any inducement held out to them to take the note, which would act as an estoppel to the defence of failure of consideration.

VI. Because his honor refused to hear a motion for a new trial on the minutes, although the notice had been given, and "surprise" and "after-discovered evidence" was one of the grounds upon which the new trial was to be asked.

VII. Because the judgment is in all respects contrary to the law and evidence of the case.

The first two exceptions might be disposed of by the remark that the "Case," as prepared for argument here, fails to afford any evidence that any such requests as are therein set forth were ever submitted to the Circuit Judge. It is true that it does appear from the charge of the Circuit Judge, as set forth in the "Case," that some request was submitted by the defendant, where he says: "I cannot charge you as requested by the defendant;" but what the request was nowhere appears except in the grounds of appeal or exceptions; and that, as we have frequently had occasion to say, is not sufficient, for the reason that while the "Case" as submitted by the appellant is open to amendment, as



well by the counsel for respondent as by the Circuit Judge when it is submitted to him for settlement, the exceptions of appellant cannot be so amended. Hence when facts are incorrectly stated, or requests to charge are not properly represented in the "Case," such errors may be corrected by amendment, but when they are found only in the exceptions, they are beyond the reach of amendment, and therefore cannot be regarded by this court. But as we are always desirous to avoid, if possible, the necessity of resting our conclusions upon points not involving the merits, we are glad to find that there is enough in other portions of the record to enable us to consider the questions which, as we understand, were intended to be raised by the first and second exceptions.

From what is said in the charge of the Circuit Judge, we infer that the request as stated in the first exception was submitted and refused by him in the language above quoted from his charge, and we think properly refused. The Circuit Judge, after instructing the jury that if the note was purchased after maturity, and without notice of any defect that there might be in it, the note would still be, even in the hands of the innocent holder, subject to any defence which such defect might warrant, goes on to add: "But if the maker of the note mixes himself up with it, then the case will stand upon a different ground," and therefore he could not charge in this case as requested by the defendant; for he could not charge the latter part of the request, which in effect called upon him to instruct the jury that if the failure of consideration was established, then "the verdict must be for the defendant," as that would ignore the effect of the estoppel to such defence set up by plaintiffs.

As to the second exception, the "Case" affords no evidence whatever that any such request was ever submitted to or refused by the Circuit Judge, and therefore, under the rule above stated, we could not consider it unless we can find in some of the other exceptions enough to raise the same questions which we infer the second exception was designed to raise. It seems to us that the object of this exception was to present two questions. 1st. Whether the statements made by defendant to plaintiffs, when about to trade for the note, were sufficient to raise an estoppel. 2nd. Whether it was necessary that such statements should have

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been made by the defendant with *an intent to deceive* the plaintiffs, in order to make the estoppel effectual. The third exception may, we think, be construed as raising the first of these questions, and the second is raised by the fifth exception, when read in connection with the third. The language of the third exception might leave it somewhat doubtful whether its object was to impute error to the Circuit Judge in charging on the facts—taking questions of fact from the jury—and instructing them as matter of law that the evidence submitted was sufficient to establish the estoppel, or whether the purpose was simply to raise the legal questions whether the testimony adduced, if believed, would raise the estoppel. But inasmuch as it is perfectly manifest that the Circuit Judge, so far from taking any question of fact from the jury, seems to have been particularly careful to leave every such question to the jury, without any intimation as to his own opinion, we presume that the latter was the real object of the exception; and if so, then it is the same as that proposed by the first branch of the request as stated in the second exception, and the question is properly before us for consideration.

The point, then, for us to determine is, whether the representation made by the defendant to the plaintiffs before they traded for the note, in regard to its character, was, if proved, sufficient to estop him from afterwards denying the truth of the statement then made. In considering this question, it would be well to bear in mind the nature of the property in regard to which the statement was made. It was a note, negotiable in form, though it had lost its negotiability—being past due at the time. When a person executes a negotiable note in favor of another, he thereby, in the eye of the law, invites the world at large to trade for it without inquiring into its origin or consideration, and no representation by him is necessary to fix his liability absolutely, no matter how defective the consideration may be. But when such a paper becomes past due, and thereby loses its negotiability in the full sense of that term, and one wishes to trade for it, he is warned by the fact that it is past due that further inquiry is necessary, in order to fix the liability of the maker, and if he takes a transfer without such inquiry, he must bear the consequences if the maker, when called upon for payment, is able to

show that the consideration has failed, or that there is any other valid defence to the note. But if, before taking the transfer, he makes inquiry of the maker, and learns from him that "it's all right," and is thereby induced to make the trade, it would seem that, upon the same principle, he ought to be protected. If the purchaser of a note strictly negotiable is protected because the maker has, by putting such paper in circulation, *impliedly* represented to any one who may purchase it that it is all right, it does seem that one who has purchased upon a similar representation *expressly* made to him by the maker, should be entitled to the same protection. Any other view would operate a fraud on the purchaser, whether so intended or not.

It is urged, however, that a representation to raise an estoppel must be a statement of existing or past facts, and not of something in the future—not a mere statement of opinion or intention; and it is argued that the statement relied on here was of the latter character. We do not so understand it. The defendant must necessarily have known, when the plaintiffs inquired of him, with a view to purchase the note, whether it was all right, that their object was to ascertain whether he had any defence or offset to it, and his reply can only be construed to be an assurance that he had none. The additional remark—"I expect to pay it in January"—relied on to show that the representation made was nothing more than a declaration to do something in the future, cannot be so construed in the connection in which it was used. If this remark stood alone, then possibly it might be so construed, though even then when made in response to the inquiry whether the note was all right, it would be more properly construed as an assurance of the highest kind that the note was all right, and because it was all right he expected to pay it. But when considered in the connection in which it was used, we think it clear that the purpose of the additional declaration of an expectation to pay in January was simply to intensify his previous statement that the note was all right. We cannot doubt that the defendant intended at the time by his reply to the inquiries made of him, to assure the plaintiffs that, so far as he was concerned, they would be entirely safe in trading for the note.

Again, it is urged that the representation to raise an estoppel

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must be made with knowledge of the facts, and that here the defendant did not at the time the representation was made, know the facts upon which he bases his defence of failure of consideration, inasmuch as he had not then had the animal in his possession long enough to ascertain whether he would come up to the warranty. But he did know that the note was given for the purchase money, in part, of the jackass; he knew the nature of the warranty upon which he had made the purchase; he knew the time that it would require to enable him to ascertain fully whether the animal would come up to the warranty; and he must have known that the object of the plaintiffs' inquiry was to learn whether there was any defect in the note before they traded for it. Knowing all these facts, if his intention had *then* been to make his liability depend upon the result of the season's operations, he could not have correctly answered as he did. He could not have answered, "Yes, the note is all right," if the question as to whether it was all right was to depend upon a future contingency. The only proper answer he could have given, under the supposition made, would have been, "I cannot *now* say whether it is all right or not, as that will depend upon the result of the season's operations." Instead of this he makes an explicit declaration, without any qualification whatever, that the note was all right, and emphasizes it by an expression of his purpose to pay the note on the first of January—but a very short time after the statement was made, and probably before he could have fully ascertained whether the jackass would come up to the warranty. It seems to us clear that the representation relied on for the purpose of raising the estoppel was amply sufficient, and if, as we must assume from the verdict of the jury, the plaintiffs were thereby induced to trade for the note, the defendant is estopped from setting up the defence of failure of consideration as against these plaintiffs. Having assured them when they were about to trade for the note that it was all right, the defendant cannot now, when called upon to pay, be heard to say that the note is not all right.

Our next inquiry is whether the Circuit Judge was in error in failing to submit to the jury the question whether there was any intentional misrepresentation by defendant to the plaintiffs—any

intent on his part to deceive the plaintiffs. Inasmuch as the "Case" does not show any request so to charge, its omission cannot be imputed as error. Indeed, we are unable to discover anything in the testimony which would render such an inquiry pertinent, for we see nothing that even tends to show that the defendant had any intent to deceive the plaintiffs. This being so, the question whether it was necessary that there should be an intent to deceive may possibly be raised under the general terms of the third exception. We will proceed, therefore, to inquire whether, in the absence of any intent to deceive, the Circuit Judge was in error in instructing the jury that the evidence, if believed, was sufficient to raise the estoppel.

It must be admitted that upon this question there is a conflict of authority, as may be seen by reference to the cases cited in the ingenious argument of the counsel for appellant. This question has been so fully and satisfactorily discussed in the case of *Horn v. Cole*, 51 (*N. H.*, 287; *S. C.*, 12 *Am. Rep.*, 111), that we shall content ourselves with a simple reference to it, not so much for the point there actually decided, as for the elaborate review of the authorities, where, we think, it is shown that the weight of the more recent authority, both in England and this country, is in favor of the proposition that *the intent to deceive* is not an essential element in raising an estoppel. That case, it is true, is questioned in the subsequent case of *Kinney v. Whiton* (44 *Conn.*, 262; *S. C.*, 26 *Am. Rep.*, 462), but only in so far as it holds "that a person who gets at second hand a declaration not intended for the public and not intended for him, may act upon it as safely as the person to whom it was addressed, and for whom alone it was intended." And this qualification of the preceding case is placed upon the ground that, "where the declaration was intended only for the person to whom it was addressed, the party making it has assumed no obligation to any other person. A by-stander who casually overhears a conversation has no right to appropriate to himself, without further inquiry, what was intended for another." Here the representation was made to the plaintiffs directly, unquestionably with the expectation that they would act upon it, as they did do, and to permit the defend-

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ant now to repudiate such representation, would operate a fraud on the plaintiffs, whether so intended or not.

We are unable to discover anything in the "Case" which would serve as a basis for the sixth exception; nothing to show that any motion for a new trial, upon any ground, was ever submitted to the Circuit Judge.

The fourth exception cannot be sustained. In *Bigelow on Estoppel*, 532, it is said: "As it is not necessary, clearly, to plead an estoppel *in pais*, in the absence of a statute, there is little to be said on the subject." We have no statute requiring it to be pleaded. Indeed, under the system of code pleading we do not well see how the estoppel could be pleaded in a case like this. The plaintiff could not by reply do so, as that pleading is only permissible where a counter-claim is set up by the answer, or where the court in its discretion may, on the defendant's motion, require a reply, which was not the case here.

The seventh exception, as has often been held, is too general to require any further notice.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

MR. JUSTICE MCGOWAN concurred.

MR. CHIEF JUSTICE SIMPSON. I concur on the ground stated in the opinion, to wit, "estoppel." But even supposing this was error, then I think the result could be sustained on the ground that the note to Traylor, assignor, was not based on the purchase of the jackass as a consideration, but upon the giving up by him of a claim on Mrs. Lyon, which was a sufficient consideration, and which has not failed.

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BOULAND v. CARPIN.

1. The provisions of the code permitting the judge to order a reference, must be read in subordination to the constitutional guaranty of trial by jury; but where the case is purely one of equitable cognizance, as, e. g., between partners for an accounting, the judge may order a refer-

ence where he is satisfied by the pleadings, or by affidavits, that it is a proper case to be referred.

2. Action for damages is not a matter of equity jurisdiction, but where asserted by way of counter-claim, growing out of the equitable case made in the complaint, the jurisdiction of the Court of Equity is not ousted.
3. Point raised by respondent in his argument that the order of reference complained of was not appealable, not considered—as respondent had made no motion to dismiss the appeal, nor given any notice that he would rely on such a position.

Before HUDSON, J., Greenville, November, 1886.

The case is fully stated in the opinion of this court.

*Messrs. Perry & Heyward*, for appellants.

*Messrs. Wells, Orr & Morgan*, contra.

July 19, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. The plaintiff alleges the formation of a partnership between himself and the defendant on the 5th of January, 1881, for the purpose of establishing a vineyard, the cultivation of the same, and the disposal of the proceeds thereof; that the place selected for the establishment of the vineyard was a certain tract of land in Greenville County, the title to which was in the name of the defendant, certain portions of which were to be provided with permanent plants each year for the series of years mentioned, with the option of extending the planting over the entire tract; that in accordance with the terms of the agreement of partnership the plaintiff advanced large sums of money as loans to the partnership; that the defendant was to have the charge and management of the plantation and the affairs of the partnership until some other arrangements should be made, he being bound to render detailed statements of the affairs of the partnership, twice in each year, during certain specified months, and to open and keep such books as might be necessary for keeping the accounts of the partnership; that it was further agreed that at some convenient time thereafter rules should be established for the purpose of determining the share of each partner in the

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proceeds arising from the partnership operations, and at the same time the basis upon which the loans of the plaintiff, with interest at five per cent., as agreed upon, were to be repaid, not, however, before the fifth of January, 1886; that all matters not specially provided for in the agreement should be regulated by the law relating to partnerships; that in pursuance of said agreement the defendant took charge of the said business, and, with the money furnished by plaintiff, planted a large part of the vineyard, and made valuable improvements thereon; that the defendant neglects and refuses to make the semi-annual statements provided for, has never paid any of the loans made by plaintiff, and will not enter into any agreement as a basis for the repayment of the same, will not come to any agreement as to the shares of the partners, and refuses to give the plaintiff any information in relation to the partnership affairs, denying that plaintiff has any interest in the business, although the plaintiff has furnished all the capital; that all the products of the vineyard have gone into the possession of the defendant, who is converting the same to his own use, and, finally, that the defendant has so conducted himself towards the plaintiff as to forbid his going on the partnership premises. The plaintiff, therefore, demands judgment: First. For the appointment of a receiver. Second. For an account of the partnership affairs; that the partnership property be sold, the loans made by plaintiff repaid with interest, and the remainder of the proceeds be divided between the parties according to their respective rights.

The defendant answers, and admits the formation of the co-partnership, but denies that the terms of such partnership are correctly stated in the complaint, and denies every allegation of the complaint except as above admitted. He also pleads a counter-claim, alleging that by reason of the failure of the plaintiff to comply with his part of the terms of the agreement, the defendant has sustained damages to a large amount for which he demands judgment.

At the call of the case the following order was granted: "On hearing the pleadings in this case, on motion of Wells, Orr & Morgan [who were the attorneys for the plaintiff], it is ordered, that it be referred to the master, S. J. Douthit, Esq., to take the



testimony in this case, and report the same to this court; that he state the accounts of the partnership, and his findings of fact and conclusions of law, with leave to report any special matter. It is provided, however, that the said statement of the accounts shall not be prejudicial to either party's right to question legality of accounting, or liability of defendant to account. The master is to pass upon all issues in the case and report the same to the court with the testimony, and either party is at liberty to have his findings and conclusions reviewed on exceptions."

To this order defendant excepted, and now appeals therefrom upon the following ground: "That his honor erred in referring all the issues in the cause, both of law and fact, to the master, against the positive objection of defendant's attorneys."

Section 293 of the Code provides that, "Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases: 1. Where the trial of an issue of fact shall require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or (2) where the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect. \* \* \* (4) The reference shall be made, in all counties in which the office of master has been established, to a master." While, of course, this provision of the code must be read in subordination to the provisions of the constitution securing the right of trial by jury in certain cases, as where, for example, one of the issues is as to title to land (as in *De Walt v. Kinard*, 19 S. C., 286), yet where no such issue is presented, and where the case is one of equitable cognizance, the above provision of the code clearly applies, unaffected by the constitutional provision above referred to.

Here it seems to us clear that the case, as made by the pleadings, was one purely of equitable cognizance, for in effect it was an action for account and settlement of the affairs of an admitted partnership, which was always regarded as an appropriate subject for equitable cognizance. We are unable to discover from the

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pleadings, upon which alone the order appealed from seems to have been granted, a single feature of a law case, except, possibly, the claim for damages set up by way of counter-claim, and even as to that the jurisdiction of the Court of Equity would not be ousted. For while it is true that a claim for damages pure and simple is not a matter for equitable jurisdiction, yet when such a claim arises, as incidental to other relief sought, of which a Court of Equity does have jurisdiction, then that court may proceed to award damages either by reference to the master or by ordering an issue of *quantum damnificatus*, to be tried by a jury. *Bird v. Railroad Company*, 8 Rich. Eq., 46, 64 A. D., 739; *Lamar v. Railroad Company*, 10 S. C., 476, and *Bath Paper Company v. Langley*, 23 Id., 145.

It will be observed that the provision of the code is permissive merely, not mandatory, and, therefore, neither party has the legal right to demand a reference of all the issues to the master, but it is a matter addressed somewhat to the discretion of the court. The judge to whom the motion is submitted must determine whether the case is such as to warrant such a reference; and this he may determine, either from an inspection of the pleadings, or from affidavits submitted as to the nature of the case, and the necessity for a long account, and whether "the investigation will require the decision of difficult questions of law." Here we agree with the Circuit Judge that the pleadings were, of themselves, sufficient to show that an accounting of partnership affairs, extending over a series of years, would be required, and there was nothing to indicate that the investigation would require the decision of any difficult question of law.

One of the points suggested in the brief submitted by the counsel for appellant is that even if the case were one proper for a reference, the plaintiff failed to make a sufficient showing to entitle him to the order. Exactly what this means, we do not understand. What essential requirement has been omitted, was not suggested or pointed out, and we have not been able to discover any. As we have said, the pleadings alone were quite sufficient to show that it was a proper case for reference; and all that was necessary was that the judge, to whom the motion was submitted, should be satisfied that it was a proper case for refer-

ence, and if the pleadings were sufficient, as we think they were, to show that fact, there surely could be no necessity that the same fact should be made to appear by affidavit.

Counsel for respondent, in his brief, presents the point, supporting it by the authorities, that the order of reference was not appealable. While there seems to be great force in this position, inasmuch as the order appealed from is somewhat discretionary, and certainly not final, and possibly does not involve the merits, yet, as there was no motion to dismiss the appeal upon this ground, and no notice given by respondent that he would seek to sustain the order appealed from on this ground, and as the question was not argued by counsel for appellant, possibly, for the reason that he had no notice that any such question would be raised, we do not now propose to consider it, or make any ruling upon the subject. We will, however, merely suggest that this case differs materially from the case of *Ex parte Maurice*, 24 S. C., 173, for there it appeared from the record that the order of reference appealed from had been granted before the necessary parties were before the court and before the issues were properly joined.

The judgment of this court is, that the order appealed from be affirmed.

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BURCKHALTER v. MITCHELL.

1. A defendant who, in ignorance of plaintiff's claim to a horse, honestly purchased it from one who had tortiously obtained possession, is entitled to demand before action is brought against him for its recovery.
2. Whether a demand was made is a question of fact which was properly left to the jury.
3. The complaint alleged that defendant wrongfully detained a chattel, for the recovery of which the action was brought, and the answer was a general denial. *Held*, that the absence and necessity of a demand before action, is not an affirmative defence, but might be insisted upon by defendant under his general denial.

Before WITHERSPOON, J., Barnwell, November, 1886.

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This was an action in claim and delivery by W. M. Burckhalter against Jonathan Mitchell. The opinion states the case.

July 20, 1887. The opinion of the court was delivered by

MR. JUSTICE MCIVER. This case was submitted on the record filed here, consisting solely of the "Case" and grounds of appeal, without any points or authorities, or argument, either oral or written, on either side.

The action was brought to recover possession of a horse, alleged to be the property of the plaintiff, unlawfully withheld from his possession by the defendant, and damages for such detention. The defence was a general denial. The plaintiff claimed to have obtained the horse from one Samp. Sellers, shortly before his death in 1876, by an alleged gift made by said Sellers while on his death-bed, and that he retained possession until the latter part of 1882, when under protest he surrendered possession to one Wall, who had married a niece of Miss Nancy Sellers, who also set up some claim to the horse, and that Wall traded the horse to the defendant. The circumstances under which the plaintiff was induced to surrender the possession to Wall do not very clearly appear from the testimony; but it would seem that there was some dispute as to the right to the horse between the wife of Wall and the plaintiff—she claiming that the horse belonged to her aunt, Miss Nancy Sellers, from whom she obtained the animal, and that the services of a trial justice were in some way, not explained, brought into requisition, who either directed or advised the surrender of the horse to Wall. The defendant, under his trade with Wall, retained possession of the horse for several years before this action was brought, without any notice or knowledge of the claim of the plaintiff, as he alleged, and without any demand for his delivery before the commencement of this action, the plaintiff, however, undertaking to show that there was such demand.

The Circuit Judge in his charge, which appears to be fully set forth in the "Case," instructed the jury that they must first inquire whether the plaintiff had made out his title to the horse; and if so, then whether the defendant had acquired the possession of the horse wrongfully or innocently, without any notice or

knowledge of the plaintiff's claim; for if he had come into possession wrongfully, then no demand was necessary, but if, on the other hand, he had honestly acquired possession from Wall, without notice of plaintiff's claim, then a demand would be necessary, even though Wall may have wrongfully acquired his possession. The jury found for the defendant, and the plaintiff appeals upon the following grounds:

"1. Because his honor held in this case demand from the plaintiff was necessary before plaintiff could recover the horse in question.

"2. Because his honor charged the jury that if they believed, from a clear preponderance of the evidence, that there was no demand upon the defendant for the property in dispute, then their verdict must be for the defendant.

"3. Because his honor held and charged the jury that it made no difference that defendant obtained possession of said property from one whose possession was tortious, so that defendant did not know of it, and that the principle of an innocent purchaser for valuable consideration applies. That if the jury believe that defendant bought the horse from one whose possession was wrongful, but that defendant was ignorant of the nature of said possession, then he was an innocent purchaser for valuable consideration against the plaintiff, and no recovery could be had.

"4. Because his honor erred in submitting to the jury the question of what is a demand.

"5. Because, even admitting that a demand in this case was necessary, it is respectfully submitted, that there was evidence tending to show that defendant held possession of said horse with notice of plaintiff's claim, and an answer denying each and every allegation put in issue the title and right of possession only, and hence the proof of plaintiff's title having been made, the plaintiff was entitled to recover."

Of course, we can only know what instructions were given to the jury by the Circuit Judge by an examination of his charge as set forth in the "Case." From such examination it is quite clear that the judge neither held nor charged as is represented in the first and second grounds of appeal. He did not instruct the jury that a demand was necessary "in this case;" nor did he

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charge that if they believed from a clear preponderance of the evidence that there was no demand, "then their verdict must be for the defendant." On the contrary, he very plainly told the jury that it would depend upon what view of the testimony they took, as to the wrongful or innocent possession of the defendant, whether a demand was necessary. The character of defendant's possession was a question of fact for the jury to determine. If they solved that question in one way, then no demand was necessary, but if in the other, then a demand was necessary, and in that event it was for the jury to determine, as a question of fact, whether there was a demand.

The third ground, as we understand it, raises the question whether, in the event the jury believed that the defendant had honestly acquired possession, in ignorance of plaintiff's claim, even though the person from whom he acquired such possession may have been a wrong-doer, a demand was necessary. We agree with the Circuit Judge (who, however, does not seem to have said what is attributed to him, in this ground, as to a purchaser for valuable consideration without notice) that one who is thus in possession cannot be mulcted in costs until some demand is made upon him by the rightful owner to surrender possession. Until such demand is made and refused he is no wrong-doer, for having acquired the property in question honestly, without any notice or knowledge of the claim of any one else, he does no wrong by simply retaining such possession until demand and refusal, for it is then only that his wrong begins. Where, however, one acquires possession wrongfully and with notice of another's claim, then no demand is necessary, for his wrong in that case begins with his possession.

As to the fourth ground of appeal, we must say that we do not clearly understand what question was proposed to be raised by it. Whether a demand was made is certainly a question of fact, and that question was properly left to the jury.

As to the fifth ground, we are somewhat in the same condition. If the proposition presented by this ground is that, under a general denial, the defendant cannot raise the question whether there was a demand, we do not think it can be sustained. The fact that there was a demand, under one of the views of the testimony

in this case, being a fact necessary to be established by the plaintiff, the defendant could, of course, dispute such fact under a general denial. It is not one of those affirmative defences which must be set up in the answer in order to warrant the introduction of testimony to establish it; and although there may have been testimony tending to show that the defendant acquired or held possession with notice of plaintiff's claim, it was for the jury to say whether such testimony was to be believed; and if so, whether it was sufficient to establish the fact of wrongful possession by the defendant. There was no allegation of a demand in the complaint, which, in the absence of a denial, should have been accepted as true. Indeed, the allegation of wrongful detention by the defendant, which was made in the complaint, superseded the necessity for any allegation of a demand; for, as we have seen, if the allegation of wrongful possession was true, then no demand was necessary.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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LAWRENCE v. ISEAR.

1. After a transcript of a trial justice's judgment has been entered in the Court of Common Pleas, he has no power to vacate the judgment thus made a judgment of a superior court, nor grant a new trial, notwithstanding the statutory right conferred upon him of granting a new trial within five days from the rendition of his judgment. MR. JUSTICE MCGOWAN *dissenting*.
2. Where a trial justice renders a judgment by default, which does the defendant manifest injustice and the default can be satisfactorily excused, the remedy of defendant is not a motion before the trial justice for a new trial, but an appeal to the Circuit Court, *Code*, § 368.

Before WITHERSPOON, J., Beaufort, September, 1886.

This was an action by F. D. J. Lawrence against Henry Isear. The opinion states the case.

*Mr. F. D. J. Lawrence*, for himself, appellant.

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*Messrs. Elliott & Howe, contra.*

July 20, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This action was originally brought before a trial justice, and, the defendant failing to appear, the plaintiff proved his claim as required by subdivision 8, of section 88, of the Code, and on April 26, 1886, recovered judgment for the amount so proved, and on April 27, 1886, having obtained a transcript thereof, filed and docketed the same in the office of the clerk of the Court of Common Pleas. Afterwards, to wit: on May 1st, 1886, the trial justice, upon defendant's motion, granted a new trial; whereupon the plaintiff appealed therefrom to the Circuit Court, upon the ground, substantially, that, after the transcript of the judgment had been filed and entered in the office of the clerk of the Court of Common Pleas, the trial justice no longer had jurisdiction to hear or determine a motion for a new trial. The Circuit Judge, holding otherwise, dismissed the appeal from the order of the trial justice granting a new trial, and this is now an appeal from the order of the Circuit Judge dismissing the appeal from the trial justice, in which the real question involved is whether the trial justice had jurisdiction to grant a motion for a new trial made after the transcript of judgment had been filed and entered in the Court of Common Pleas.

Section 87 of the Code provides that: "A trial justice, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the Circuit Court of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon and entered in the docket; and from that time the judgment shall be a judgment of the Circuit Court." And subdivision 13, of section 88, provides that upon the judgment so docketed with the clerk of the Circuit Court, "the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of the Circuit Court." Under these statutory provisions it is quite certain that when the transcript of the judgment in this case was docketed with the clerk of the Circuit Court, on April 27, 1886,



it became "from that time \* \* \* a judgment of the Circuit Court," and that the execution issued thereon by the said clerk to the sheriff must "have the same effect and be executed in the same manner as other executions and judgments of the Circuit Court."

This being so, the practical inquiry is, whether a trial justice has any jurisdiction, by an order for a new trial, or otherwise, to set aside or even suspend such a judgment. To say the least of it, the exercise of such a power by an inferior tribunal over a judgment of a superior tribunal would be not only anomalous, but extraordinary. But when we find that it has been judicially declared in *Doty & Co. v. Duvall* (19 S. C., 143), that the powers of a trial justice are purely statutory, and when there is no statute conferring such an extraordinary power on a trial justice, it would seem that there is not the least vestige of authority for a trial justice to exercise such a power.

But it is contended that inasmuch as a trial justice is, by subdivisions 17 and 18, of section 88, of the Code, invested with the power to grant a new trial, provided the motion for that purpose "shall be heard within five days from the rendering of the judgment," this section must be read in connection with the preceding section in such a manner as to give full effect to both. So that where, as in this case, the motion for a new trial is heard by the trial justice within the five days, the filing of the transcript of the judgment in the Circuit Court before the expiration of the five days, must be regarded as premature, and, therefore, as not ousting the jurisdiction of the trial justice to hear and determine the motion for a new trial. Such a view manifestly involves the necessity of interpolating a provision into section 87, whereby the right to file a transcript of judgment would be postponed until the expiration of the five days within which the losing party is permitted to move for a new trial. It would be necessary to carry out this view, that words something like the following should be added to section 87: "At any time *after* the time allowed for a motion for a new trial, or for giving notice of appeal" a trial justice, on the demand of the party, &c.

But the legislature has not seen fit to insert any such words in the section, and we do not see by what authority we could ven-

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ture to do so. We have no power to alter or amend a statute. It may be that, when the law was so amended as to confer upon a trial justice the power to grant a new trial, it would have been better, in order to give full efficacy to such power, that section 87 should have been so altered and amended as to postpone the right to demand a transcript of judgment for file in the Circuit Court until after the expiration of the time allowed to make the motion for a new trial. But this has not been done, whether through oversight or by design, is wholly immaterial. This court has no power to supply any defects, either real or supposed, in an act of the legislature.

But suppose we could hold that the trial justice had jurisdiction to grant the new trial in this case, we do not see of what avail it would be to the defendant, as long as there is a judgment, which, under the express terms of the statute, had become the judgment of the Circuit Court before the motion for a new trial was made, which could be enforced by an execution issued by the clerk of that court and placed in the hands of the sheriff; for surely no order of a trial justice could in any way affect a judgment of the Circuit Court, or suspend the enforcement of it by execution in the hands of the sheriff of the county.

It seems to us, however, that the defendant mistook his remedy, and has applied to the wrong tribunal for relief—that instead of applying to a court which could give him relief, provided he is entitled to it, he has applied to a court which no longer had the power to relieve him. It does not appear very distinctly in the record what was the ground upon which his motion for a new trial, addressed to the trial justice, was based, but we infer from what does there appear, that it was based upon the ground that manifest injustice had been done him, and judgment had gone against him by reason of his default in not appearing at the original trial, and that he could satisfactorily excuse such default. If this be so, then under a provision contained in section 368 of the Code, his remedy was by appeal to the Circuit Court, and not by a motion before the trial justice for a new trial. That provision reads as follows: “If the defendant failed to appear before the trial justice, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he

satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial, before the same or any other trial justice in the same county, at such time and place, and on such terms, as the court may deem proper." This provision would have afforded him complete relief, provided he showed himself entitled to it, for under it he could not only obtain an order for a new trial, but what was more important, an order to "*set aside or suspend judgment*," pending the result of the new trial, which latter he could not obtain by applying to a trial justice.

The judgment of this court is, that the judgment of the Circuit Court be reversed.

MR. CHIEF JUSTICE SIMPSON concurred.

MR. JUSTICE MCGOWAN, *dissenting*. Section 87 of the Code, as to a trial justice granting "a transcript" of a judgment rendered by him, is inconsistent with subdivisions 17 and 18 of section 88, which give him the right to grant a new trial within five days. The provision giving the right to move for a new trial within five days, is as positive as that in reference to the right "to transcript;" and I think that, as far as possible, they should be reconciled, which can be done by considering the right to "transcript" as in abeyance during the five days allowed for appeal; that until the time for appeal has expired, the judgment is not perfect, or in a condition to be "transcripted." This question was touched, though not decided, in the case of *Abrams v. Carlisle* (18 S. C., 245), where the court say: "Under ordinary circumstances we think it the better course for him (trial justice) to regard the case as still pending until the time allowed for a new trial or appeal has expired."

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MORGAN v. KEENAN.

A decree which, apart from its reasoning, simply adjudged "that the cause remain on the docket until the report of the receiver herein and until the further order of this court," is not appealable.

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Before NORTHROP, J., Union, June, 1876.

The decree in this case, after expressing the opinion of the judge upon some of the issues involved, concluded as follows: "The receiver was appointed under these proceedings at the suggestion of the plaintiffs and by consent of the defendants. The court is therefore not prepared to dismiss the bill, nor yet prepared for a final order. It is therefore ordered and adjudged, that the cause remain on the docket until the report of the receiver herein, and until the further order of this court."

From this decree both parties appealed.

*Messrs. Bobo & Carlisle and J. S. R. Thomson*, for plaintiffs.

Arguments of *J. H. Rion* and *J. B. Steedman*, both deceased, were read for defendants.

August 18, 1887. The opinion of the court was delivered by

MR. JUSTICE NORTON (who sat in the stead of the Chief Justice, who had been of counsel in the cause). This action was commenced in equity by a creditor's bill, filed February 9, 1867, by plaintiffs, as holders of \$7,000 of the bills of the Cotton Planters Loan Association of the 5th Congressional District of S. C. It alleges the formation of the association, the misconduct of the directors, the refusal of some subscribers to pay the stock subscribed by them, the issuing, holding, falling due, and non-payment on demand of said bills, and the forfeiture of the charter of the association. It prays that the directors and stockholders of the association, and "all others that in the progress of the case may be found to in any way withhold from plaintiffs that which is justly due may be made parties, that the association be put in liquidation," &c.

On August 20, 1869, Judge Thomas dismissed the bill on demurrer on the ground that the organization of the association was intended to aid the war then being waged against the United States. This judgment was reversed on appeal. 1 S. C., 327. Judge Thomas granted two orders in the case, the 1st, on April 24, 1869, prior to the dismissal on demurrer, referring it to the clerk to make

a full statement of the amounts due by the association, of the amounts of cotton subscribed and not accounted for by the defendants as members of the association, and of the amounts owing to the association, by whom, and whether such debtors were solvent, reserving the equities of the defendants; and the 2nd, on September 7, 1871, appointing R. W. Shand, Esq., receiver of the property of the association, with the right to call in its debtors and settle with them by suit or otherwise, at the earliest possible term, and directing him not to sue persons "that are known to be unable to pay," and make his report to this court. On September 10, 1873, the clerk reported the creditors and debtors of the association as required by order of April 24, 1869.

The case was heard by Judge Northrop at June term, 1876, and he, on September 20, 1876, filed his order, wherein, after reciting the proceedings in the action and discussing and stating his views on certain legal propositions, he concludes: "It is therefore ordered and adjudged, that the cause remain on the docket until the report of the receiver herein and until the further order of this court." It is to this order that both plaintiffs and defendants have excepted and from which they appeal.

In our opinion the order is not appealable. It is merely for the continuance of the action. It is not an intermediate judgment, order, or decree involving the merits. It could not possibly fall under any other head of matter which is appealable. The reasons given by the judge are no part of his order, and this court is not to be considered as affirming or disaffirming their correctness, nor the correctness of any legal views expressed by the judge in the discussion leading up to the order; these reasons and views are not now properly before us for decision.

The judgment of this court is, that the appeals herein be dismissed without prejudice to the parties.

## SAWYER v. SENN.

1. S. being indebted to bank by overdrafts on his individual account \$40 and, also, on account of S. & Son, \$1,112, his wife gave her bond, wherein it was recited that S. was indebted by overdrafts to said bank to the amount of \$1,500, and the condition of said bond was that said S. would pay \$1,500 with interest one year after date; and this bond was secured by a mortgage of Mrs. S.'s separate estate. *Held*, that this bond and mortgage secured not only the overdrafts on S.'s individual account, but also all indebtedness which overdrafts would create against S., and the terms of the mortgage on record so informed all subsequent purchasers of the mortgaged land.
2. By agreement between the bank and S. he continued to make deposits with the right to check out, which he did fully. *Held*, that this agreement was no fraud on Mrs. S. or her other creditors, and these deposits, under this agreement, were not applicable to the overdrafts on S.'s former account.
3. To satisfy the bank examiner, Mrs. S. gave her note for \$1,500, payable at 90 days, and the proceeds were credited to S.'s deposit account, but within a month, she signed an agreement that said note was cancelled, and the original bond and mortgage were to continue of force. *Held*, that Mrs. S. could not claim that her mortgage was released by the note, nor could a mortgagee subsequent in time to the cancellation of this note.
4. Where a bond secures all overdrafts creating a debt against S., parol testimony is admissible to show what overdrafts do create such an indebtedness; as, for example, overdrafts of a partnership firm of which S. was a member.
5. An extension of time, with the consent of the surety, does not release him, and certainly not where the extension is to the surety himself.
6. The bond above recited did not create a continuing guaranty, but only a guaranty of the amount of indebtedness by overdrafts on January 27, 1878, not exceeding fifteen hundred dollars.

Before FRASER, J., Richland, April, 1886.

Judges Witherspoon and Norton sat at the hearing of this appeal, in the stead of the Chief Justice and Mr. Justice McGowan.

The appeal was from the following decree:

This case was heard by me at the term of the court held in March and April, 1886, on the report of the master and exceptions thereto. This case was before me at a previous term of the court, and an order made by me May 2, 1884, recommitting the

case to the master with directions to take certain testimony and report again his conclusions to this court. The master's report thus made is the one under consideration. Circumstances make it necessary for me to announce my conclusions very briefly. Plaintiff claims under a bond and mortgage dated January 27, 1877, and the defendants under a bond and mortgage dated May 25, 1878, executed by defendant, Margaret R. Senn, wife of Rufus D. Senn, the latter of whom, with a son, constituted the firm of R. D. Senn & Son. Mrs. Senn was in no way connected with their transactions in business, except by these bonds and mortgages. Plaintiff claims priority of payment under the mortgage of January 27, 1877, and defendants, F. W. Wagener & Co., dispute his right to such priority. These papers have all been duly executed and recorded.

The first objection raised to the plaintiff's mortgage is, that the bond recites as its consideration an indebtedness of R. D. Senn to the bank by overdraft. I have not changed the opinion expressed in the order of May 2, 1884, that it does not impair the validity of this bond and mortgage that it is shown by parol proof, or other evidence, that the indebtedness which was in the contemplation of the parties as the consideration of the bond was the overdraft of R. D. Senn & Son, and not of *R. D. Senn*. The seal itself imported a consideration. If R. D. Senn & Son was indebted to the bank, then certainly one of the partners, R. D. Senn, was indebted to the bank, and there is no inconsistency. Under this view the bond became on its face an obligation to pay \$1,500 twelve months after date absolutely. If it were not that the bond and mortgage can be shown to be only collateral, then it would be enforced for its full amount—\$1,500 and interest.

A conveyance absolute on its face can be shown by parol testimony to be only security for a debt or a mortgage, and the same rule should apply to a bond and mortgage for the payment of money absolutely and to show that it is a collateral only. I am satisfied from the evidence in this case—and for this purpose the testimony of plaintiff and R. D. Senn is competent—that this bond and mortgage was given, not as payment, but simply as security for the payment of the amount due at its date by overdraft by R. D. Senn & Co. If that overdraft has not been paid,

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then plaintiff's bond and mortgage is still an existing obligation for its payment and has its priority.

I think that *prima facie* the effect of the mode of keeping accounts between R. D. Senn & Son and the bank before and after the date of this bond and mortgage was to set off the first deposits afterwards made against the sums due the bank by overdraft. This was, however, only a presumption, and I think has been rebutted by the testimony. For the purpose of showing what was the agreement and understanding between the parties as to the appropriation of payments, I think the testimony of plaintiff and D. R. Senn competent. Taking their testimony, and all the other circumstances of the case, I have come to the conclusion that the deposits made after January 27, 1877, were to be held for *future checks*, and were so paid out, and that this was not a new contract, but the agreement in reference to these deposits, which went into effect and was acted upon by the *parties* from the beginning. Such an agreement does away with the presumption arising from the way in which deposits and checks were entered on the general account. *Jones Chat. Mort.*, § 638; 1 *Jones Mort.*, § 905.

The note of Mrs. Senn, March 1, 1878, for \$1,500, at 90 days, endorsed by R. D. Senn & Son, and the accompanying agreement signed by her, does not operate as payment of the overdraft of R. D. Senn & Son, and seems to have been a mere change of the form of the debt for which she and R. D. Senn & Son were liable to the bank. The debt not having been paid, the mere delivery of the mortgage to her, to be re-delivered immediately under the agreement, does not seem to me to be a release of its lien, *as there was no consideration for such release or extinguishment, and no purpose to extinguish it, and the paper was not under seal*. For these reasons, and subject to the qualification that I regard the debt due by overdraft at the execution of the bond and mortgage, and interest thereon, as the amount covered by the mortgage, the exceptions are overruled and the report of the master confirmed and made the judgment of the court.

It is adjudged, that the mortgaged premises described in the complaint in this action, or so much thereof as may be sufficient to pay the sums due, with interest and costs, be sold at public



auction by the master of Richland County, upon the following terms, &c. &c.

From this decree, F. W. Wagener & Co. appealed to this court upon the following exceptions, omitting the first three :

IV. That his honor erred in holding that the validity of the bond and mortgage of 27th January, 1877, is not impaired by showing by parol proof or other evidence that the indebtedness contemplated by the parties as the consideration of the bond was the overdraft of R. D. Senn & Son, and not of Rufus D. Senn, in so far as F. W. Wagener & Co., subsequent mortgagees without notice thereof, are concerned.

V. That his honor erred in not holding that parol proof or other evidence was inadmissible to show that R. D. Senn & Son and Rufus D. Senn were the persons whose indebtedness by overdraft was contemplated so as to affect F. W. Wagener & Co.

VI. To the statement that "if R. D. Senn & Son were indebted to the bank, then, certainly, one of the partners, R. D. Senn, was indebted to the bank, and there is no inconsistency."

VII. To the statement that "under this view" (excepted to immediately *ante*), "the bond became on its face an obligation to pay \$1,500 twelve months after date absolutely"; whereas, whether this or any other view be correct, it is plainly expressed on the face of the bond that it is not an absolute but a conditional obligation of a guarantor.

VIII. To the statement that "if it were not that the bond and mortgage can be shown to be only collateral, then it would be enforced for its full amount, \$1,500, and interest."

IX. That his honor erred in holding that the testimony of plaintiff and Rufus D. Senn is competent to show that, and that this bond and mortgage were given as security for the payment of the amount due at its date of overdraft by R. D. Senn & Co.

X. That his honor erred in holding that if the overdrafts by R. D. Senn & Son have not been paid, then the bond and mortgage to plaintiff are still existing obligations for the payment of said overdrafts, and have priority over the bond and mortgage to F. W. Wagener & Co.

XI. That his honor erred in holding that the *prima facie* effect of the mode of keeping accounts between R. D. Senn & Son and

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the bank, both before and after the bond and mortgage were given to plaintiff, to wit: to set off the first deposits afterwards made against the sums due the bank by overdrafts, has been rebutted by the testimony, in this, because: (a) Such testimony is inadmissible to affect either Mrs. Senn or Wagener & Co. (b) Even if admissible, its effect should have been ruled to be to release Mrs. Senn, and in no manner to affect injuriously Wagener & Co.

XII. That his honor erred in holding "that for the purpose of showing what was the agreement and understanding between the parties as to the appropriation of payments, the testimony of plaintiff and R. D. Senn is competent, in this: (a) That no question of appropriation of payments arises. (b) That said agreement and understanding being made without the knowledge or assent of Mrs. Senn, releases her.

XIII. That his honor erred in holding that the agreement made between the plaintiff and R. D. Senn, that the deposits were to be held for future checks, is binding upon Mrs. Senn and Wagener & Co., whereas he should have held that the deposits went to payments of overdrafts in the usual course of business, at least so far as Mrs. Senn and Wagener & Co. are concerned.

XIV. That his honor erred in holding that this agreement did away with the *prima facie* effect of the mode of keeping accounts between the bank and R. D. Senn & Son, in so far as Mrs. Senn and Wagener & Co. are concerned.

XV. That his honor erred in not holding that the note of 1 March, 1878, and accompanying agreement, even if not payment of the overdrafts of R. D. Senn & Son, were a release of Mrs. Senn's mortgage to plaintiff.

XVI. That his honor erred in holding that the delivery of the mortgage to Mrs. Senn was not a release of its original lien.

XVII. That his honor erred in overruling the exceptions of Wagener & Co., and confirming the report of the master.

XVIII. To all the ordering, adjudging, and decreeing portions of the decree.

XIX. That the complaint as originally filed without the insertion of paragraph III. a warranted testimony and inquiry as to the individual overdrafts of Rufus D. Senn only, and as amended

by the insertion of paragraph III.*a* warranted testimony and inquiry on the part of plaintiff, in so far as Wagener & Co. are concerned, to the overdrafts, neither of Rufus D. Senn individually, nor of R. D. Senn & Son, and that said complaint should have been dismissed as to Wagener & Co., in so far as it sought to establish a priority of lien against them, and his honor should have so held.

XX. That his honor should have granted Wagener & Co. the entire relief sought by them.

*Messrs. Bachman & Youmans*, for appellants.

The amendment to the complaint should not have been allowed. *Code*, §§ 144, 196, 200; 5 *S. C.*, 289; 21 *Id.*, 225, 242; 2 *Wait Prac.*, 469. Wagener & Co. can insist upon all defences that Mrs. Senn has; and Mrs. Senn being a surety is a favorite of the law. 17 *S. C.*, 4; *Brandt Sur.*, § 79. She occupies a stronger position as guarantor. *Brandt*, §§ 1, 9. Deposits should be applied to oldest overdrafts. *Morse Bank*, 27, 28; 1 *Mer. Ch.*, 604; 2 *Barn. & Ald.*, 43; 4 *Q. B.*, 792. Mrs. Senn was entitled to the protection of this principle, and any agreement made to the contrary without her consent discharged her. The overdrafts secured were only those of R. D. Senn—not those of Senn & Son. *Morse Bank*, 40; 6 *Ad. & Ell.* (N. S.), 514. This was the only notice that record gave to Wagener & Co. 12 *C. E. Green Eq.*, 374; 14 *S. C.*, 321. The bank books also showed payment. *Morse*, 48, 249, 316; 25 *Ill.*, 35. Surety is released by any change in the contract. 2 *Lead. Cas. Eq.* (Wh. & T.), 1875, 1907. As to rights of subsequent mortgagees, see 2 *Mill Con. R.*, 267. Bond recites only debt of Senn, and the obligee knew of the two accounts. 3 *McCord*, 567; 1 *Greenl. Evid.*, § 277. This was not a continuing guaranty. 1 *Bail*, 620; *Rice*, 131. Plaintiff now seeks to reform his contract, but it cannot be done. 1 *Hill Ch.*, 126; 2 *McCord Ch.*, 142; 4 *Rich. Eq.*, 313. Certainly not as to Wagener & Co. 38 *Ala.*, 338; 43 *Mo.*, 179; 5 *Mason*, 572.

*Mr. John T. Sloan, jr.*, contra.

The meaning of a contract is not to be changed because one of

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the parties is a surety. *Brandt Sur.*, § 80; 2 *How.*, 426; 22 *S. C.*, 279; 23 *How.*, 164. Senn was indebted by overdrafts—its matters not whether individually or as a member of a firm. Deposits made before bond debt fell due could not be applied to that indebtedness. 9 *S. C.*, 314; 12 *Rich.*, 524; *Morse Bank*, 380; *Story Prom. Notes*, § 489. A surety cannot control the application of payments directed by the principal. *Pitman Pr. & Sur.*, 159; 3 *Strob.*, 497. The overdraft was to continue for a year. The agreement as to subsequent deposits was no injury to Mrs. Senn. 52 *Ind.*, 513; 47 *N. Y.*, 668; 5 *Metc.*, 259; 22 *S. C.*, 279. Besides, Mrs. Senn knew all about it. The deposits did not extinguish the old account, because it was otherwise agreed. 1 *Am. Lead. Cas.*, 283; 9 *S. C.*, 344; 20 *Id.*, 34; *Jones Chat. Mort.*, § 638. Nor was the note intended or accepted as payment. 5 *Beav.*, 423; 131 *Mass.*, 467; 12 *Penn.*, 605; 11 *S. C.*, 547; 13 *Id.*, 253; 15 *Id.*, 72; 21 *Id.*, 142, 290.

August 22, 1887. The opinion of the court was delivered by

MR. JUSTICE NORTON. Rufus D. Senn is the husband of M. R. Senn and the senior member of the firm of R. D. Senn & Son. On January 27, 1877, M. R. Senn executed to plaintiff, as cashier of the Central National Bank, her bond for \$3,000, and recited therein that, "Whereas Rufus D. Senn, by overdrafts, has become indebted to the said Central National Bank to the amount of fifteen hundred dollars, and is unable to refund the same. Now the condition of this obligation is such, that if the said Rufus D. Senn \* \* \* do and shall well and truly pay or cause to be paid unto the above named J. H. Sawyer, cashier as aforesaid, \* \* \* the full sum of fifteen hundred dollars, twelve months from this date," with interest, &c., then to be null and void, and gave her mortgage of even date on real estate to secure said bond.

The actual liabilities of R. D. Senn at that date on overdrafts to the bank were, on his individual account, \$40.40, of which \$30 was paid July 2, 1877; and on the account of R. D. Senn & Son, \$1,112.36. On March 1, 1878, M. R. Senn delivered to plaintiff her note for \$1,500, endorsed by R. D. Senn & Son, to change the form of indebtedness of R. D. Senn & Son's over-

drafts. This note was cancelled and the original bond and mortgage continued of force, about March 25, 1878, by M. R. Senn's written agreement. R. D. Senn & Son deposited at numerous times between January 27, 1877, and January 27, 1878, sums, which in the aggregate amounted to \$15,451.71, which by agreement between R. D. Senn & Son and the said bank, made prior to any of said deposits, they were to use in their business by drafts from time to time as the deposits were made, and they did so use the whole of said deposits and became further indebted to said bank by overdrafts.

M. R. Senn executed to F. W. Wagener & Co., on May 25, 1878, a bond for \$2,000, conditioned that Rufus D. Senn should pay to them \$1,000, with interest, by March 20, 1883, and secured the same by a second mortgage on the real estate mortgaged to plaintiff as aforesaid.

Plaintiff on June 5, 1882, commenced this action against M. R. Senn and F. W. Wagener & Co. to foreclose his mortgage, and subsequently had leave to amend his complaint by alleging as paragraph 3a, that there was a mistake in the condition of the bond, and that it was intended to cover overdrafts by R. D. Senn & Son. Mrs. Senn answered, setting up various defences, all of which she subsequently withdrew. F. W. Wagener & Co. answered, setting up their own mortgage, admitting all of the allegations of the complaint except paragraph 3a, and alleging that plaintiff's bond was conditioned for the payment of overdrafts by Rufus D. Senn individually made; that he was not so indebted; that R. D. Senn & Son had paid their overdrafts existing when M. R. Senn's bond to plaintiff was executed—first, by deposits of \$15,451.71 between its date and maturity; and second, by the note of M. R. Senn for \$1,500, endorsed by R. D. Senn & Son.

This action has been reduced to a contest for priority between two mortgage creditors of M. R. Senn. Mrs. Senn has waived any defence she may have had to either. F. W. Wagener & Co.'s mortgage is valid. It is, however, junior not only to plaintiff's mortgage, but also to the latest transaction between plaintiff and M. R. Senn. They are subsequent creditors and required to take notice only of the contract which was referred to in the rec-

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ord of January 31, 1877, and not of any other or variation of this contract, whether written or oral, whether left out of the instrument referred to by mistake or otherwise. The allegations of paragraph 3a of the complaint are therefore immaterial to the case as it now stands.

What was that contract? M. R. Senn's bond and mortgage were collateral, and it was not material to state the precise amount of the principal debt, the object being to make the collateral large enough to cover that. So the sum stated in the collateral is \$1,500, to secure a then subsisting indebtedness of Rufus D. Senn to the Central National Bank by overdrafts of any person or persons, who could create an indebtedness against him by drafting; that the principal of such indebtedness should not exceed \$1,500. Rufus D. Senn was then liable to said bank on overdrafts by himself, \$40, of which \$30 was paid July 2, 1877, and by his firm, R. D. Senn & Son, \$1,112.36. The withdrawing by R. D. Senn & Son of all of their subsequent deposits by special agreement prior to their having been made, prevents them from being applicable under the general rule to the extinguishment of their overdrafts existing on January 27, 1877, the time for the payment of which had been extended one year by the transaction on that day.

In order to make it appear to the comptroller of the currency that the form of the indebtedness to the bank had been changed from overdrafts by R. D. Senn & Son to bankable paper, M. R. Senn made her note at ninety days for \$1,500 to R. D. Senn & Son, which was by them endorsed to the bank and a credit of that amount entered on their deposit account. This was not intended as, and was therefore not, a payment, and as soon as the exigency had passed, long before the note fell due and about two months before the mortgage to F. W. Wagener & Co., the transaction was annulled and the parties and their accounts restored to their previous condition by writing the following words across the face of the note, to wit: "This paper being informal is cancelled and the original bond and mortgage in possession of the bank to continue of force. (Signed) M. R. Senn, J. H. Sawyer, Cashier. Witness, R. D. Senn."

This amounted to a recognition by M. R. Senn of the continu-

ing validity of her bond and mortgage to plaintiff for the original purpose. The record having remained intact, was notice to F. W. Wagener & Co. of the exact *status quo* at the time he took his mortgage. If the plaintiff had appealed, he might have had, in addition to the amount adjudged to him by the master and Circuit Judge, the amount of Rufus D. Senn's individual account, but not having appealed, the Circuit decree cannot be disturbed in that respect.

Having announced our conclusion on the law and facts, let us turn aside to review the exceptions and able argument for F. W. Wagener & Co., which militate against our decision.

The first three exceptions do not raise any issue of substance, were not argued, and need not be considered. The next seven relate to the construction of the condition of M. R. Senn's bond to plaintiff and what parol proof is admissible. If the written words of that were construed to mean that Rufus D. Senn had become indebted to the bank by overdrafts drawn by himself on his individual account, then the authorities cited by counsel seem decisive that no parol proof could be adduced to reform it, or give a different effect as to F. W. Wagener & Co., subsequent encumbrancers. But having construed that to mean that Rufus D. Senn had become indebted by overdrafts by whomsoever drawn, so only the drawer or drawers had power to create an indebtedness against him by drawing, it was competent to prove by parol who had made such drafts and for how much. It was proven that he was a general partner in the firm of R. D. Senn & Son, and it follows that their overdrafts created an indebtedness against him and were within the contemplation of that bond, and unless discharged, retained their priority under the mortgage over F. W. Wagener & Co.'s debt under his mortgage.

The next four exceptions relate to the admissibility of the evidence to prove the agreement as to deposits by R. D. Senn & Son subsequent to M. R. Senn's bond and mortgage to plaintiff, and as to the effect of such agreement on F. W. Wagener & Co. In addition to the authorities cited by plaintiff, it is clear upon reason that R. D. Senn & Son might make such a contract without consulting M. R. Senn or her subsequent creditors. By her bond she contemplated that no payments were during the

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ensuing twelve months to be made on the overdrafts to which it was collateral. They were to be paid twelve months from that date—not within one year, nor by, nor on or before, a particular day. The contract was with reference to funds not only upon which she had no lien, but which she could not consistently with her undertaking have requested to be applied to the overdrafts. It would not have been a fraud upon her rights if R. D. Senn & Son had had exactly the same transactions with another bank without agreement and without notice to her, and it cannot be that such an agreement might not be made, so as to allow R. D. Senn & Son to continue to bank with the bank of their choice.

If these deposits did not relieve her, they cannot be considered with reference to F. W. Wagener & Co. They were then utter strangers and only became creditors of M. R. Senn on May 25, 1878, when she became surety for her husband, Rufus D. Senn's debt to them. The deposits had then all been made and all withdrawn, and their equities are only what hers then were. She had waived her right to insist upon the deposits as payment by her conduct in reference to her \$1,500 note. There was no writing in reference to the deposits, and we know of no rule which excludes parol testimony as to the terms on which they were received.

The 15th exception is "that the note of March 1, 1878, and accompanying agreement, even if not payment of the overdrafts of R. D. Senn & Son, were a release of Mrs. Senn's mortgage to plaintiff." It is probable from the argument that this exception is intended to cover the position that M. R. Senn was a surety; that as such the extension of time given by taking a note at ninety days was a release of her bond and therefore of her mortgage. But an extension of time with the consent of the surety does not release him; here the extension was to the surety herself. Besides, she afterwards agreed to cancel the transaction and restore matters to their original status, and this while she owed neither F. W. Wagener & Co. nor any one else.

The 16th exception asserts that the delivery of the mortgage to Mrs. Senn was a release of its original lien. It does not appear that there was in fact any delivery to M. R. Senn of her mortgage, but the recital of the accompanying paper: "I have



this day deposited" the bond (which was already in the possession of the bank), imports that it was to continue in the bank's possession for the new purpose. The instantaneous transfer for the purpose of the deposit, being similar to that of a deed where there is instantaneous reconveyance by way of mortgage for the purchase money, could not operate except for the purpose of the transfer, and not by way of extinguishment. Were it otherwise, then there was a mutual mistake as to the validity of the substituted paper, which would be a good consideration and reason for cancelling the whole transaction, including the delivery of the mortgage; and then the delivery would not work a satisfaction of the mortgage; but the fact being as we adjudge, that there never was an actual delivery, and never was intended by any party to the papers to be a constructive delivery, there was no delivery, and the mortgage retains its original vitality as against any supposed redelivery thereof to M. R. Senn. The transaction was with M. R. Senn herself, and she could not take any undue advantage of plaintiff therein, nor does she seek to do so, nor can F. W. Wagener & Co. compel her to do so. They must be content with the situation as they found it May 25, 1878.

The last four exceptions are general and have been disposed of in the discussion of the other sixteen.

F. W. Wagener & Co. argue that the judge erred in holding that M. R. Senn's bond was a continuing guaranty. We do not understand him to have so held, and we adjudge that it was only a guaranty of the amount due on January 27, 1877, with interest as stipulated.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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MCGOWAN v. REID.

1. A chattel mortgage is good between the parties without witnesses, but must have one witness and probate to entitle it to record. Where it has two subscribing witnesses, proof by one is sufficient to entitle it to be introduced in evidence.

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2. But, *if seems*, where a certain number of witnesses is required to make a paper valid, all of that number so subscribing should be produced, if within reach of the court, whenever there is any real contest over the execution.
3. The mortgagee of chattels, after condition broken, is entitled to the possession of the property, and he may, by parol, authorize an agent to make seizure thereof. Here the authority to seize was in writing, and witnessed, but not being denied, and a witness not required by law, it was not necessary to produce the subscribing witness.
4. Where the mortgagor points out property to the agent of the mortgagee as that which is covered by the mortgage, he cannot afterwards recover damages for illegal seizure, upon the allegation that the property seized was not embraced in the mortgage.
5. A mortgage may subsist as a valid security, although the note secured thereby is barred by the statute of limitations.
6. The possession of a chattel by the mortgagor after condition broken is not adverse, where such possession is permissive and by consent.

Before FRASER, J., Newberry, November, 1886.

At the hearing of this appeal, Mr. Justice McGowan declined to sit on account of his relationship to one of the parties. The facts of the case sufficiently appear in the opinion of the court.

*Mr. F. P. McGowan*, for appellant.

*Mr. T. S. Moorman*, contra.

September 10, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff, appellant, in November, 1879, executed a mortgage conveying to the defendant, respondent, three mules, one horse, and fifty sheep, to secure a debt of \$206.79, payable on January 1, 1880. The property remained in the possession of the appellant until March 6, 1886, when the respondent seized two mules and eighteen sheep under and by virtue of said mortgage. This seizure was made by an agent of respondent, appointed for that purpose. The action below was brought for damages on account of said seizure. The verdict was for the defendant, respondent, and the plaintiff has appealed upon the following exceptions, to wit:

I. "Because his honor erred in holding that it was not neces-

sary to produce both of the subscribing witnesses to the mortgage to prove its execution.

II. "Because his honor erred in allowing the power to foreclose the mortgage to be proved in the absence of the subscriber to the same, and in holding that it was not necessary for such power to be given under seal.

III. "Because he erred in charging the jury that they must take the mortgage as proof in the case.

IV. "Because he erred in charging that if the plaintiff pointed out the stock to the agent as covered by the mortgage, he is now estopped.

V. "Because he erred in charging that the natural increase of the stock was covered by the mortgage, although the mortgage does not purport to cover such.

VI. "Because he erred in refusing to charge as requested, viz., that the mortgage was barred by the statute of limitations.

VII. "Because he erred in charging that the plaintiff's possession of the stock was permissive, and that it was necessary for him to give notice to the mortgagee, or to do some act changing the character of his possession, before the plaintiff's possession could ever bar defendant's right to seize the property."

It appears that the mortgage had two subscribing witnesses. The plaintiff, in making out his case, admitted the existence of the mortgage, and that it had not been satisfied; but when it was interposed by the defence, he objected to its introduction, on the ground that it had not been proved, whereupon W. R. Reid, one of the subscribing witnesses, proved its execution and delivery, and when the defendant was put upon the stand, the mortgage was handed to him, who testified that it was under it that he had seized and sold the property. The plaintiff objected that the mortgage had not been offered in evidence, and there appearing two witnesses thereto it could not be introduced until proved by both of said witnesses. The judge ruled that proof by one was sufficient, but he suggested that the handwriting of the other be proved, which was done, when the mortgage was admitted.

We know of no law which requires a chattel mortgage to be attested by subscribing witnesses, one or more, in order to make it valid between the parties. True, with a view to recording it

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should be attested by at least one witness, so that it might be probated to the end of recording; but between the parties it is good without recording and without the presence of an attesting witness. But even if one or more witnesses were required, *non constat* but that one might prove it. Mr. Greenleaf and Mr. Starkie both say, in discussing the mode of proving private papers, that the instrument being produced must be proved by the subscribing witnesses, if there be any, or at least by one of them. 1 *Greenl. Evid.*, section 569; *Starkie*, 504. Where there are more subscribing witnesses than one, the absence of all must be accounted for before secondary evidence can be let in. 1 *Greenl.*, section 574. And, doubtless, where the law requires more than one attesting witness to make the paper valid, and there is a real contest over the proper execution, all should be produced, if alive and within the reach of the court, but if any are dead or absent, proof of handwriting will be sufficient. But where attestation is not necessary to the validity of the paper, and yet it happened to be attested by one or more witnesses, we do not know that all of them should be produced at the trial, as the only mode of proving its execution. In analogy to bonds and notes under section 2213, General Statutes, if the execution is denied under oath, it might be necessary to prove it by the subscribing witness; but when not thus denied, in accordance with the act in such cases, such testimony would be unnecessary.

But be this as it may, here one of the subscribing witnesses testified, proving the execution and the delivery, and also the handwriting of the other. Under these circumstances the judge held the evidence sufficient and let the mortgage go to the jury as part of the evidence of the defendant, which is the complaint in the 3d exception. We do not understand that in this ruling his honor charged upon the facts, nor was there any legal error in either of his holdings on this subject. The cases relied on by appellant, *i. e.*, *Hopkins v. Albertson*, 2 Bay, 484; *Sims v. Degraffenreid*, 4 McCord, 253; and 1 *Brev.*, 245, &c., &c., were cases in which the paper in question was required under the law to be attested by two or more subscribing witnesses. In such cases, as we have said above, the witnesses must be produced or their absence accounted for, when the handwriting may be

proved. But these cases have no application here. In any event, we do not think that his honor erred in this case in overruling plaintiff's objection as to the necessity of producing both of the subscribing witnesses to the mortgage, nor in allowing the mortgage to go to the jury on the evidence taken.

This disposes of exceptions one and three, and also exception two, as very much the same objection is raised therein in reference to the appointment of the agent who seized the property as that already discussed. The action of the plaintiff recognizes the agency, as the defendant is sued for the act of the agent. But besides this it is not necessary that power to seize a chattel under a mortgage covering it should be delegated in writing under seal or otherwise. In contemplation of law chattels conveyed by mortgage, at least after condition broken, become the property of the mortgagee, subject to his seizure, either through the sheriff or any other agent appointed by him, but we do not know that the authority to seize should necessarily be in writing. Here it seems that it was in writing and attested, but we think the position taken above as to the proof of the mortgage applies to the agency. No witness being required, and no denial on oath being made, it was not necessary to call the attesting witness to the appointment.

The 4th exception complains because his honor charged that if the appellant pointed out the stock to the agent, he was now estopped. When this remark is taken in connection with the immediate context, there was no error. The judge had just charged that if the defendant seized property not embraced in the mortgage, he was liable; but then said in substance that if the plaintiff pointed out the stock seized as the property covered by the mortgage, he could not now complain. In other words, having admitted at the time of the seizure that the stock seized was embraced in the mortgage, and having pointed it out as the property mortgaged by him, he could not now dispute it so as to recover damages for an illegal seizure.

What his honor said as to the natural increase had no application to the case, as there was no allegation or contention that any increase had been seized.

The 6th exception concerns the plea of the statute of limita-

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tions. If the action below had been an action by the defendant against the plaintiff for the foreclosure of his mortgage, the pertinency of this plea would have been more apparent. In such case the question whether or not the mortgage was barred by the statute might have been raised, but even in that event we think his honor's ruling would have been correct. In the recent case of *Nichols v. Briggs* (18 S. C., 473), this court held that the fact that a note secured by a mortgage might be barred did not necessarily bar the mortgage. A debt may be evidenced by several securities, and while the payment of the debt would extinguish all, yet the fact that suit could not be brought on one would not of itself prevent action upon the others. As to this, each would stand upon its own character. Here there was a note which no doubt was barred, but in addition there was a mortgage, which, not being a note or personal bond for money only, was not subject to the statute interposed.

The action below, however, was not by the defendant against the plaintiff to foreclose his mortgage, but it was an action by the plaintiff for the recovery of personal property and for trespass thereon. And the real question in the case, growing out of the fact that the defendant claimed immunity for taking the property, on the ground that the property was his, is, was he barred by the statute from asserting his claim, admitting that at one time it was a valid claim, and could have once been asserted as was done here? In other words, could the plaintiff rely upon the six years' possession, which it is admitted he had held? Should the defendant have asserted his right within the six years, and having failed so to do, had the possession of plaintiff ripened into a good title, upon which the seizure of the defendant was a trespass, and wrongful? There is no doubt that six years' possession of a chattel as owner, and in defiance of all others, will ordinarily prove and give title, but such possession must be open and adverse. It must be in opposition to the true owner; where, however, it is permissive, and by consent so understood, and so acted upon, it cannot ripen into a title and thus defeat the legal owner. His honor charged in accordance with this principle, and we think he was correct.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

## SIMMS v. SOUTH CAROLINA RAILWAY COMPANY.

1. The trial judge erred in charging the jury as matter of law that it was the duty of the conductor of a railroad train to assist passengers to alight at the station of their destination. The judge should have left it to the jury to say whether a failure to render such assistance was negligence under the circumstances. MR. JUSTICE McIVER *doubted* whether even the jury could consider such failure as an element of negligence.
2. That degree of care which exonerates a person from contributing to the negligence that has caused him his injury, does not depend upon his age or physical or mental condition, but must be measured by some common standard, and that standard is—a prudent, reasonable man in possession of ordinary senses and capacities. *Renneker v. South Carolina Railway Company*, 20 S. C., 219, approved.
3. An exception imputing error to the judge in failing to qualify a general charge, not considered—the attention of the trial judge not having been directed at the time to the desired qualification.

Before WITHERSPOON, J., Berkeley, June, 1886.

The opinion states the case.

*Messrs. Brawley & Barnwell*, for appellant.

*Messrs. Mitchell & Smith and J. N. Nathans*, contra.

September 20, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. This case involves that perplexing question, negligence, and it arises out of the following general facts: The respondent was a passenger on the appellant's railroad from Charleston to Summerville, the latter point being her destination. As the train approached Summerville the conductor "called out Summerville," and the passengers destined to that place prepared to disembark, the respondent among them. After stopping and remaining, as it is alleged,

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the usual time, the train moved on ; as it began to move forward the respondent, who was on the steps or platform of the rear car preparing to alight, perhaps becoming alarmed or agitated, jumped from the moving car, fell, broke her arm, and was otherwise injured, for which injury the action below was instituted, alleging negligence in the employees of the company.

At the trial, various requests to charge were made to the presiding judge, both by the respondent, plaintiff, and the defendant, appellant, most of which his honor charged, and there being no appeal from several of them, it will not be necessary to mention or consider them all. In addition to responding to these requests, his honor made a general charge covering the whole case, which in the main was entirely fair, just, and legally correct. There was, however, in our opinion, one important error, which is fatal to the judgment rendered, and which necessitates a new trial.

The first exception of appellant is as follows : "Because his honor erred in charging the jury that it was the duty of the conductor to assist the passengers out of the train." His honor, in discussing the legal propositions involved, among other things, said : "If he, the conductor, gave her (the plaintiff) sufficient notice on approaching the station that that was her point of destination, it was her duty to have got ready to have got out, *and it was his duty to assist the passengers out*, especially any that were aged, helpless, and infirm. Did he assist the passengers out, or was he careless in his duties on that occasion?" &c. Inasmuch as it was apparent from the testimony that the conductor did not assist the plaintiff in alighting from the car, by any personal and direct act of assistance, the jury under this charge could not have done otherwise than find for the plaintiff. Because here was an announcement by the judge that the law required such assistance to be rendered, and consequently that the absence of such assistance was negligence.

Negligence, as we understand it, is in the main a question of fact, or rather whether it exists or not in a special case is a question of fact for the jury. All that the law has ever determined on the subject is, that it consists in failing to bestow due care to the matter in hand ; failing to do that which due care requires to



be done, or doing that which said care forbids. This is about all that a judge can ordinarily say to the jury as to the law of negligence. Whether the facts proved show the absence of this care, is for the jury, untrammelled by any expression of opinion from the judge. Now, it seems to us that his honor here went beyond this rule when he charged the jury, as matter of law, that it was *the duty of the conductor* to assist the passengers off. He ought to have left this to the jury. It was their province to say whether failing to assist the plaintiff under the circumstances surrounding her and him, the conductor failed to bestow that care which the matter reasonably demanded at his hands.

The appellant excepted secondly: "Because his honor erred in charging the jury that it was the duty of the conductor to especially assist the passengers out who were 'aged and helpless and infirm,' without the necessary qualification that notice of such age, helplessness, or infirmity must be brought home to the conductor by the passenger, or the conductor be proven to have had knowledge of the same." Negligence, as we have said, being defined in law to be the absence of due care, it is, of course, a relative matter, and therefore what would be negligence in one case might not be so in another. But the whole question, where the case escapes a demurrer or non-suit, is for the jury upon all the testimony. And inasmuch as we think it was error for the judge to charge as he did, that it was the duty of the conductor to personally assist the plaintiff in attempting to leave the car, this error would not have been cured even if the qualification suggested had been made. What we desire to be understood as saying is this, that the fact that a conductor fails to assist a passenger in disembarking from the car, cannot be laid down in law as constituting in itself negligence, but it is a fact which may go to the jury with the other facts, including a want of knowledge on the part of the conductor of the age and infirmity of any passenger, as circumstances for them to consider in determining the question whether due care had been observed or not. And it is the province of the jury to decide the force and effect of such testimony and not for the judge.

The third exception complains: "That his honor erred in charging the jury without qualification, that the reasonable time

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which it was the duty of the defendant to give passengers upon stopping to alight from its train at any station, must be in reference to the person, whether it be a child or a hale man—an aged person or decrepit person—they must have time with reference to their physical condition.” The qualification deemed necessary is not mentioned, nor does it appear that the attention of the judge was drawn to any especial qualification desired by appellant. There is no complaint because of the fact that the judge charged the general proposition as to reasonable time, it is only that this proposition was charged without qualification, but the qualification desired was not requested at the time of the charge. We therefore pass this exception by.

The fourth and last exception refers to contributory negligence. The defendant requested the judge, in substance, to charge that what would be due care in one so as to shield him from contributing to his own injury, might not be so as to another; that this matter depended upon the condition of the person. In other words, that what might not be an imprudent or rash act, looking to its consequences, in one in the full possession of his physical and mental faculties, might be so in one deficient in this regard. In the case of *Renneker v. S. C. Railway Company* (20 S. C., 219), Mr. Justice McGowan, in delivering the opinion of the court, announced what we think is the correct principle in such cases as follows: “Where the rights and obligations of one party are made to turn upon the proper caution of another, it would seem that there should be some common standard by which to test the fact, and we know of none more practicable other than that of a prudent, reasonable man in possession of the ordinary senses and capacities. When arrangements are made, suitable and proper for such persons, nothing more should be required, and one falling below this standard, either physically or mentally, should be cautious and prudent in proportion to such defect. Railway companies, though held to a high degree of care, do not insure the safety of passengers under all circumstances.”

It is the judgment of this court, that the judgment of the Circuit Court be reversed.

MR. JUSTICE MCGOWAN concurred.

MR. JUSTICE McIVER, *concurring in the result*. I do not understand that there is any *legal* duty resting upon the conductor of a railway train to assist the passengers in leaving the cars. It is true, in one sense of the word, it may be the duty, not only of the conductor, but also of any gentleman standing by, to assist a lady or an infirm person in leaving the cars; but that is not such a duty as a court of law takes cognizance of, or undertakes to enforce, but rests rather on considerations of politeness or humanity. I am not prepared, therefore, to say that the failure of a conductor to assist a passenger in leaving the cars is one of the circumstances to be considered by the jury in determining the question of negligence.

Judgment reversed.

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MAGOVERN & CO. v. RICHARD.

BATES, REED & COOLEY v. SAME.

1. An insolvent debtor has the right to prefer one of his creditors, provided it is not done in a general assignment for the benefit of all his creditors, and, provided further, it is not accepted by the creditor with knowledge of the debtor's insolvency, within ninety days before such debtor makes a general assignment. An ordinary mortgage executed by an insolvent debtor with intent to secure and prefer one creditor over others and covering a large portion of his property, is not void under the assignment act, *Gen. Stat.*, § 2014.
2. A decree should not be sustained where it is based upon a ground not raised by the pleadings.
3. Where a mortgage is based upon a valuable consideration and is not taken for the purpose of hindering, defeating, or delaying creditors, it is not void under the statute of Elizabeth, even though the mortgagor was insolvent, the mortgage embraced all of the debtor's visible property, and by agreement was not to be recorded for 40 days.
4. Findings of fact by the Circuit Judge from testimony heard by him, reversed.

MR. JUSTICE MCGOWAN, *dissenting*.

Before COTHREN, J., Darlington, November, 1886.

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These were actions by Magovern & Co. against G. Richard and Bollmann Brothers, and by Bates, Reed & Cooley against the same defendants. The cases are fully stated in the Circuit decree, which was as follows:

G. Richard was engaged in business as a merchant, at Darlington, in 1883. In the summer of that year he was insolvent, but purchased a large stock of goods at the north on credit. He was then largely indebted to his co-defendants, Bollmann Bros., with whom he had been doing business since 1879. They held no security for their demands against him until November 13, 1883, when he executed, in their favor, a bond in the sum of ten thousand dollars, to be paid within sixty days from its date, and secured the same by a chattel mortgage on all his stock of goods, wares, fixtures, &c., in his store and bar at Darlington. This mortgage, by special agreement between the parties, was not to be recorded for forty days after its date. The bond became due on January 10, 1884, and on the day following W. P. Cole, as the agent of Bollmann Bros., seized the said goods, &c., for the purpose of foreclosing the said mortgage.

And on the same day of January, 1884, Magovern & Co. commenced their action in behalf of themselves and of all other creditors of G. Richard, save Bollmann Bros., who might come in in due time and contribute to the expense of the action. They alleged the indebtedness of Richard by note, dated August 20, 1883, in the city of New York, in the sum of \$387.87, due November 20, 1883; his indebtedness to Bollmann Bros.; the execution of said chattel mortgage to Bollmann Bros.; that Bollmann Bros. had cause to believe Richard to be insolvent; that the mortgage was executed in fraud and in violation of chapter 72, of General Statutes, and that Richard had no other property out of which the claims of his unsecured creditors could be satisfied. The complaint prayed that the mortgage be adjudged to be an assignment, giving preference, &c., be declared fraudulent and void; that a receiver be appointed, for injunction, &c.

Judge Hudson granted an order of injunction at his chambers, on January 13, 1884, and the defendants answered and moved for a dissolution of the injunction before Judge Kershaw, at Orangeburg, on the grounds that Magovern & Co. were not

judgment creditors of Richard, and that a mortgage was not an assignment within the provision of the 72d chapter of the General Statutes. Richard admitted, in his answer, his indebtedness to Magovern & Co., and to Bollmann Bros., but denied his insolvency, the conveyance of all his property to Bollmann Bros., and alleged that the mortgage was executed in good faith, to secure his past due demands to Bollmann Bros., and advances to be made to him by them. Bollmann Bros. admitted Richard's indebtedness to them in the sum of \$8,513.78, but denied his insolvency, and also alleged that the mortgage was executed by Richard *bona fide*, upon being granted an extension of payment as to his past indebtedness, and in consideration of advances to be made, and that they had actually advanced to him since the execution thereof the sum of \$854.59. Judge Kershaw dissolved the injunction January 28, 1884, holding that Magovern & Co. were not judgment creditors of Richard, and that a mortgage was not an assignment, under chapter 72 of the General Statutes.

Bates, Reed & Cooley, on February 8, 1884, instituted their action against the defendants under the 13th Elizabeth. The complaint prayed judgment that the mortgage be adjudged fraudulent and void, that a receiver be appointed, for injunction, &c. Richard and Bollmann Bros. answered, making a general denial of all the allegations of the complaint, except that Richard admitted his indebtedness to the plaintiff, and both alleged that the mortgage was executed in good faith and as a security for advances, as in the Magovern case. On February 5, 1884, I being then on the Fourth Circuit, granted an order of injunction and a rule to show cause why a receiver should not be appointed, and, afterwards, upon a motion to dissolve the injunction, a consent order was passed by me, directing the sale of the goods, and the delivery of the proceeds thereof to Bollmann Bros., upon their entering into bond for the forthcoming of the same.

The sum involved in these cases is in the neighborhood of \$3,000. They were heard together by agreement of counsel upon testimony taken before the trial, and the oral evidence of several witnesses taken before me. I have met no difficulty in reaching a conclusion as to the character of this transaction. The insolvency of Richard was clearly established by several witnesses of

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the highest character. In fact, he boasted himself to Mr. Ward, one of the witnesses for the plaintiffs, that he went to New York with only \$100, and bought a large stock of goods. This was in the summer of 1883, when Mr. Ward says, he was not only insolvent, but had been for some time before. The dates of his purchases show that they were made in the summer of 1883, and that his indebtedness therefor became due a little later than November 13, 1883, the date of his mortgage to Bollmann Bros. Richard himself must have known that he was insolvent, and it would seem reasonable to conclude that Bollmann Bros. knew it also. He had been dealing with them for several years, and fell behind with them each year, owing them the large sum of \$8,513.78. His real estate was under mortgage to Pelzer, for its value, and Mr. Ward says he had very little in the way of goods in store when he visited the north to buy goods. This condition of his debtor could hardly have escaped the skill and experience of a merchant of forty years standing.

But if it did, it would seem that Bollmann Bros. did have reasonable cause to believe Richard to be insolvent in November, 1883. When the season had well advanced he had failed to reduce his heavy indebtedness, and had no security to furnish except a chattel mortgage on an unpaid-for stock of goods, for the large sum of ten thousand dollars. Others knew his insolvency well. The cashier and teller of the Darlington National Bank, as well as Mr. Ward, say that Richard was in bad credit; notes were protested, &c. In these days of rapid communication, such damaging facts to the credit of a merchant travel with great rapidity, even to the most distant points, and the creditor is timely advised thereby of the failing condition of his debtor, almost without effort on his part. Besides this, it seems to be a most remarkable circumstance, that Bollmann Bros. should not have known that Richard's real estate was under mortgage, and that he was in bad credit, and still more so, that they could have neglected to make inquiry as to the financial condition of one of their customers who owed them so much and was yearly falling behind. From these circumstances and the undoubted testimony, I conclude that Richard was insolvent at the date of the execution of the mortgage, and that Bollmann Bros. knew it.

But it is said that even if this be so, that the mortgage was executed in good faith and was therefore valid. Richard's condition, his indebtedness to Bollmann Bros., and the large demands becoming due for the goods purchased, renders it very difficult to believe that he had any hope or intention to pay the mortgage when he made it, or that Bollmann Bros. thought that it would be paid when they received it; but when the time of payment of the mortgage is fixed by the parties at sixty days from its date, the mortgage is made to cover unpaid-for goods in store, and by special agreement to be withheld from record for forty days, it is impossible for any fair mind to resist the conclusion, that it was a mere device to evade the statute, and prefer Bollmann Bros. by a mortgage, as he could not do by direct assignment, and to defeat, delay, and defraud the other creditors of Richard. The explanation offered by the parties for not recording the mortgage, so far from being a satisfactory removal of a very damaging circumstance, is, actually, more significant than the circumstance itself. Because it is obvious that the knowledge of the mortgage derived from the records could not have had the effect claimed for it—that of injuring Richard in his collections—but would, on the contrary, have alarmed Richard's northern creditors, whose claims were about becoming due, and might have led them to take steps to prevent the seizure and sale by Bollmann Bros. of the goods for which Richard had not paid. The recording of the mortgage did have this effect upon these plaintiffs, and set on foot immediately these vigorous proceedings, and it does not appear that Richard was injured in his collections.

The defendants contend, however, that the mortgage cannot be an assignment under section 2014 of the General Statutes, because it does not convey the entire property of Richard, as was the case in *Wilks v. Walker*, and in *Austin, Nichols & Co. v. Morris*. While this is true, yet these cases proceed upon the doctrine that the law deals with the mischief to be prevented, so that Richard transferred to Bollmann Bros. all of his tangible property of value and applicable to payment of his debts. Leaving out a shell or shadow of property, these cases would be authority for granting the relief prayed for by the Magovern & Co. complaint. The courts of Alabama have construed a similar

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statute to ours, to this effect: that a conveyance by which a debtor parts with substantially all his property, is an assignment. *Waters v. Matthews*, 1 *South. Law T.*, No. 27, page 622.

But it is alleged that there were good liens and accounts to the large sum of \$8,000, and real estate outside of the mortgage to Bollmann Bros., worth \$5,000. As to the first—there is no evidence save that of Richard himself—the value of evidence on this point could not fail to be appreciated; yet there were no books, no records, no written or oral evidence of a dollar, except his own statement, and he was impeached by witnesses of the highest character, as unworthy of belief, and there was no attempt to rebut it. Independent of this, the circumstances show that it is not true; for if he had possessed these valuable choses in action, he would have placed some of them with the bank and saved his paper from protest. He would have transferred in part, some of them to Bollmann Bros., perhaps all of them, as he owed them about equal amounts, or else he would have offered them to Mr. Ward when he tried to borrow money from him, or, perhaps, to these plaintiffs, and escaped this suit. It is improbable that he had these valuable assets, or they would have been used in some way to alleviate his desperate financial condition.

Then as to the real estate, it may be remarked that it was the family residence, and under a mortgage to Pelzer for \$4,000. It appears, however, that Pelzer paid Richard \$1,000 for the lot, and took his deed in satisfaction of the mortgage. This, however, does not establish the value of the lot, because the creditor is frequently influenced to pay a bonus to a failing debtor, to acquire possession of property, as is illustrated in these cases, by advancement to Richard by Bollmann Bros. of \$854.59, to acquire even a chattel mortgage of ten thousand dollars on a stock of goods which sold for some \$3,000 or less. It would be just as reasonable to conclude that Richard's real estate was worth \$1,000 more than Pelzer's mortgage, as it would be to hold that his stock of goods was worth \$854.59 more than \$8,513.78, which he then owed Bollmann Bros. Pelzer paid his \$1,000 to get the deed, and Bollmann Bros. \$854.59 to get their mortgage, it would seem.

But the value of the real estate was not more than \$3,000 or



\$3,500, in the opinion of several witnesses of high character and large intelligence, one of whom was a dealer in real estate, and it was in proof that the lot on which the Enterprise Hotel was subsequently erected on the opposite side of the street, a larger lot, better located, was sold about that time for only \$4,000, one half cash, the balance in the stock of the company. The Richard lot may have been of equal value, but the witnesses thought otherwise; still, as it was the family residence and mortgaged to Pelzer for \$4,000, it furnished no means of paying the creditors. It was, as to them, the shadow of property. The law does not deal with speculative values, and I cannot conclude because Mr. Pelzer has seen fit, for unexplained reasons, to pay Richard \$1,000 more than his mortgage for the property, that that sum fixes its value. I find, therefore, that the real estate of Richard was mortgaged to Pelzer for its market value, and that he had no property outside of the property included in his mortgage to Bollmann Bros.

It is contended, however, in argument by the defendant's counsel, that the dissolution of the injunction by Judge Kershaw, in the case of Magovern & Co., is fatal to the plaintiffs in that case, because they neglected to appeal therefrom. I cannot so hold. There is no imperative rule in regard to appeals from orders dissolving injunctions. 2 *High Inj.*, 1702; *Dudley Eq.*, 29. There was no intention to hear the case on its merits by Judge Kershaw, and no right so to do at chambers. *Hornesby v. Burdell*, 9 *S. C.*, 303.

In the case of Bates, Reed & Cooley it was insisted that the mortgage would be sustained as to the sums advanced after its execution. I do not concur in this view, because the money was not advanced in good faith as a *bona fide* loan, but that he was paid by Bollmann Bros. that sum of money for the preference, and that the mortgage was both conceived and executed by Richard, and received by Bollmann Bros., with the intent to hinder, delay, and defeat the other creditors of Richard. So, the fact that Bollmann Bros. actually made advances to Richard after the execution of the mortgage, cannot alter the character of the original transaction as made to defeat and defraud the other creditors of Richard, I find that the transaction was fraudulent. *Beattie v.*

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*Pool*, 13 S. C., 379; *McSween v. McCown*, 23 Id., 342; *Jones Chat. Mort.*, 350. When a conveyance is good in part and bad in part, it is void *in toto*, and no interest passes to the grantee under the part which is good. 14 *Johns.*, 459; *Wait Fraud. Con.*, §§ 194, 434.

It is, therefore, sufficient to say that I find as matter of fact, that the evidence fully sustains all the material allegations of the complaints in both actions, to wit: that Richard was insolvent at and before he executed the mortgage in question. To Bollmann Bros. he gave it, with intent to prefer Bollmann Bros. to the exclusion of his other creditors; that he executed it and they received it with intent to hinder, delay, and defraud the other creditors of Richard, and that it covered all of his property of value and applicable to the payment of his debts. In reaching these conclusions, I have not been influenced by the evidence establishing numerous forgeries on the part of Richard, subsequent to the execution of the mortgage; for, independent of this, I consider the testimony strong and convincing as to the fraudulent character of the transaction.

I conclude as matter of law: 1. That the mortgage from G. Richard to Bollmann Bros., dated November 13, 1883, of the goods, wares, &c., mentioned in the complaint, is in violation of sec. 2014 of the General Statutes, and void. 2. That said mortgage was executed by G. Richard, and received by Bollmann Bros. with intent to hinder, delay, and defeat the creditors of G. Richard, and is fraudulent and void as against the plaintiffs, and those creditors of G. Richard who have joined them in these proceedings.

It is therefore ordered, adjudged, and decreed, that said mortgage be set aside as fraudulent and void, and all rights thereunder be vacated and annulled as against these plaintiffs, and those creditors of G. Richard who have joined them in these proceedings, and that the defendants, Bollmann Bros., do pay over to the clerk of this court, within fifteen days from the date of the filing of this decree, the proceeds of sale of the property sold under the former order of this court, together with the interest due thereon, and that they do pay the costs of this action. It is further ordered, that the said proceeds and interest be distri-

buted by the said clerk among the plaintiffs and the other creditors of G. Richard who have joined them in these proceedings *pari passu*, or in proportion to the amount of their respective debts, after the payment of a fee to the attorneys of record in said cases. It is further ordered, that the clerk of this court do ascertain and report what would be a proper fee to be paid to said attorneys, one fee to include services in both cases. And it is further ordered, that the plaintiffs and defendants have leave to apply at the foot of this decree for such further orders as they may deem necessary to speed the cause.

The order of Judge Kershaw, dissolving the injunction, referred to in the Circuit decree and also in the opinion of this court, was as follows:

A motion is made before me at chambers upon proper notice to dissolve a preliminary injunction ordered by his honor, Judge Hudson, upon the *ex parte* application without notice of the plaintiffs. The defendant, G. Richard, a merchant in failing circumstances, executed and delivered to Bollmann Bros. a chattel mortgage covering his stock of goods, leaving his other creditors, of whom are plaintiffs, to whom he is largely indebted, insufficiently provided for. The plaintiffs have not established their demands by a judgment at law, and this is the principal ground upon which the motion here is rested. Admitting the general principle that they would have no status in a Court of Equity in an ordinary case without having first established their case by a judgment, plaintiffs insist that they have a right to this action, under section 12 of the act of February 9th, 1882, since incorporated in the General Statutes. In order to establish this they insist that the aforesaid chattel mortgage to Bollmann Bros. is an *assignment* for the benefit of creditors within the purview of that statute.

The chapter of the general statutes, of which this statute is an amendment, was the same in effect as the act of 1828 (6 *Stat.*, 365), *General Statutes* (chap. 97, sec. 5, pt. 2), and continued on this principle. The law has, therefore, been of force for more than half a century, and it never yet has been supposed that a chattel mortgage executed by a debtor to a creditor to secure an outstanding debt, was an assignment for the benefit of creditors,

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though such mortgages have been of frequent occurrence, and the subject of litigation upon other grounds. The provisions of the act are totally irreconcilable with the idea that such a transaction with an individual creditor was in the contemplation of the legislature. There is nothing in the assignment act of 1882 which tends in any way to convert such a provision for a creditor into a general assignment for the benefit of creditors. On the contrary, the distinction is there clearly drawn between the two kinds of instruments in this: that a mortgage or other conveyance to a creditor, whereby such creditor is secured by the debtor, is made void, if the debtor was at the time insolvent, and if the creditor knew of such insolvency, or had reason to believe that it existed, in case the debtor should, within ninety days thereafter, make an assignment for the benefit of creditors.

Before this act was framed, a debtor could make preferences in a general assignment for the benefit of creditors, and could make such preferences by previous dispositions of his estate as he pleased; provided, that it was not done for the purpose of defrauding or delaying other creditors. By this act the law relating to assignments for the benefit of creditors was changed, so that preferences in such instruments were made to render such assignment "absolutely null and void, and of no effect whatever." As to the other instruments made to secure creditors, whereby preference was given to such creditors, they are not at all affected by the act unless within ninety days they are followed by a general assignment for the benefit of creditors; but the law remains as to the preferences by such instruments just as it did before. It is well that the construction contended for by the plaintiffs cannot be sustained, as its consequences would be far-reaching, and probably disastrous to the mercantile classes. The motion must prevail.

It is ordered, that the injunction order granted herein, bearing date January 12, 1884, be vacated and set aside, and that the plaintiffs pay the defendants their costs and disbursements on this motion. Also ordered, that the many papers and all the affidavits read at the hearing be filed with the clerk.

The defendants, Bollmann Brothers, appealed from Judge Cothran's decree on the following grounds:

1st. That his honor erred in holding, as a conclusion of fact, that the mortgage in question was executed with intent to prefer Bollmann Brothers, to the exclusion of Richard's other creditors, and that Richard executed it and Bollmann Brothers received it with intent to hinder, delay, and defraud the other creditors of Richard, and that it covered all of Richard's property of value and applicable to the payment of his debts.

2d. That his honor erred in holding, as a conclusion of law, that the mortgage in question is in violation of section 2014 of the General Statutes, and void.

3d. That his honor erred in holding, as a conclusion of law, that the mortgage in question was executed by G. Richard and received by Bollmann Brothers, with intent to hinder, delay, and defeat the creditors of G. Richard, and is fraudulent and void as against plaintiffs and such creditors as have joined them in their actions.

4th. That his honor erred in declining to hold that the order of Judge Kershaw dissolving the injunction in the case of *Magovern & Co. v. Richard et al.*, was *res judicata* as to all questions between the parties decided by that order, and such questions could not be reviewed by him.

5th. That his honor erred in holding that the transaction between Richard and Bollmann Brothers involving the execution of the mortgage was fraudulent, and that the mortgage was void, even as to the actual advances made under it.

6th. That his honor erred in holding that the mortgage in question was a mere device to evade the statute and prefer Bollmann Brothers by a mortgage, as he could not do by direct assignment, and to defeat, delay, and defraud the other creditors of Richard.

Plaintiffs in the case first stated then gave the following notice of appeal:

That it was error in his honor, Judge Kershaw, to dissolve the injunctions made in this cause by Judge Hudson, upon the ground that a mortgage by an insolvent debtor can never be an assignment for the benefit of creditors within the purview of the 72d chapter of the General Statutes.

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*Messrs. T. Moultrie Mordecai, Boyd & Nettles, and B. H. Rutledge, for Bollmann Brothers.*

*Messrs. G. W. Dargan, E. K. Dargan, and C. S. Nettles, contra.*

September 20, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. These two cases were heard together below and also in this court, but they have no necessary connection with each other, nor are they governed by the same principles; therefore, though embraced in the same opinion, they have been considered and determined separately, as will appear below. The object of the action in each case was to annul and set aside a chattel mortgage executed in 1883 by the defendant, Richard, to his co-defendant, Bollmann Brothers. In the first named case the ground of the assault was that the alleged mortgage was really intended as an assignment, in which a preference was given to the said Bollmann Brothers, and therefore void under the assignment act, general statutes; that of the second, was that said mortgage was void under the statute of Elizabeth. The plaintiffs in the first action had not reduced their claim to judgment, but those in the second had.

In the first action his honor, Judge Hudson, on *ex parte* application of plaintiffs, granted a preliminary injunction restraining Bollmann Brothers from enforcing their mortgage. This injunction, on proper notice of motion thereto, was dissolved by his honor, Judge Kershaw, at his chambers, his honor holding that the mortgage in question could in no sense be regarded as an assignment with preference. From this order there was no appeal. But on the hearing of the case afterwards by Judge Cothran, the ground upon which Judge Kershaw had dissolved the injunction was reversed, and the mortgage was held an assignment and executed in violation of the spirit, at least, of the assignment act, and therefore null and void. The same holding was held by his honor, Judge Cothran, in the second case, and also that the said mortgage was fraudulent and void as intended to delay, defeat, and defraud the creditors of the said Richard.

From the decree rendered below, embracing the two cases, the appeal is now before us, in which error is alleged to said decree in the first case: 1st. Because his honor, Judge Cotthran, reviewed and reversed the ruling of Judge Kershaw. And, 2d. That if Judge Cotthran had jurisdiction of the matter ruled by Judge Kershaw, that then he erred in holding the mortgage an assignment with preference, and therefore void under the assignment act. In the second case—that he erred in holding the mortgage void, whether his said holding was based on the idea that the mortgage was an assignment, or in fraud, or a contrivance to defeat, delay, &c., creditors, and therefore void under the statute of Elizabeth.

Now, applying our remarks to the first above named case, we are compelled to say that we do not find in the testimony anything more than an ordinary mortgage executed by a debtor—insolvent, no doubt, at the time—covering a large portion of his property in favor of one creditor over other creditors; this done in the exercise of a right which has been recognised almost time out of mind in this State and elsewhere in numerous cases still standing unoverruled, and which, until they are overruled, are authority upon this court. See numerous cases in our own reports. The recent cases of *Wilks v. Walker*<sup>1</sup> and *Austin, Nichols & Co. v. Morris*<sup>2</sup> have not touched this principle. Nor did the assignment act intend to touch it; or, if such was the intention, it does not appear in the language used in said act. That act was intended to meet an evil, which, at the time of its passage, was in existence, and was growing in the commercial world, to wit: the practice of making general assignments ostensibly for the benefit of all creditors, but yet preferring in said assignment some creditors to others; and the purpose of the act was to cut up this practice root and branch, which it was hoped could be accomplished by simply declaring that the preference given should in itself, whether fraudulent or not, avoid the instrument or assignment. There was not a word or an intimation that the long established right of securing one creditor over others by mortgage, judgment, or sale of property was stricken at. On the contrary, in the second section of that act, as Judge

<sup>1</sup>22 S. C., 108.<sup>2</sup>23 S. C., 393.

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Kershaw very forcibly says in his decree dissolving the injunction: "The distinction is there clearly drawn between the two kinds of instruments in this, that a mortgage or other conveyance to a creditor, whereby such creditor is secured by the debtor, is made void, if the debtor was at the time insolvent, and if the creditor knew of such insolvency, in case the debtor should, within ninety days thereafter, make an assignment for the benefit of creditors." There the act itself distinctly recognized the difference between a mortgage to secure a creditor, even by an insolvent debtor, and known to be so by the creditor himself, and an assignment for the benefit of creditors generally; and it impliedly, at least, sustains a mortgage given under such circumstances, provided it is executed longer than ninety days before the assignment.

As the law now stands under our decided cases, these two things, to wit: the right of a debtor to give a preference by mortgage, judgment, or other paper, to one creditor over others, and his inability to do so in an assignment for creditors, are separate and distinct matters, and they cannot be confounded or intermingled. Each case must stand upon its own facts. If these show simply a mortgage, and that it was executed with no general assignment following it within ninety days, although the debtor may be insolvent at the time with the knowledge of the creditor, it must stand, because the creditor, under long established law, has obtained vested rights thereby which no court can divest, except in the exercise of legislative functions, which no court in this State is authorized to do. If, on the contrary, the facts show a preference given in an assignment for the benefit of creditors, or the execution of a mortgage within ninety days before such an assignment by an insolvent debtor, and known to be so by the mortgagee, then it is obnoxious to the act, and will be declared void. The case of *Wilks v. Walker*, *supra*, does not conflict with these principles, because the court there held that the defendant had admitted by his demurrer the charges in the complaint that an assignment had been made with a preference, and in that case provision was made in the papers in contest for the payment of another creditor besides the mortgagee or vendee. But especially the court relied on the admission by the defendant of



the charge that he had executed an assignment in violation of the assignment act.

In the case now before the court there seems to be no doubt that Bollmann Brothers held a valid claim on Richard. They had a right to sue and obtain judgment, or they had a right to procure a mortgage or any other security. The law encourages vigilance, and we know of no legal obligation resting upon a creditor to notify the world, that he intends to make, or is making, an effort to secure his debt. It is true, it might be high morality and distinguished abstract fairness and justice for a creditor to give up this right and refuse to take any security for his debt, unless all creditors are brought within the same protection; but the law does not require this, and such unselfish and disinterested benevolence and fairness has seldom been practised. We concur with Judge Kershaw, that there was nothing in the facts of this case to avoid Bollmann Brothers' mortgage under the assignment act. Inasmuch as we have thus concurred in the general result of Judge Kershaw's holding, it is not necessary to discuss the question whether his decree dissolving the injunction was reviewable by Judge Cothran.

This brings us to the second case. It does not clearly appear whether his honor annulled the mortgage in this case as in violation of the assignment act, or as void under the statute of frauds. If the former, then what we have said above applies. And, besides, such an issue was not raised in the pleadings in this case, and a decree based upon that ground would be beyond the issue.

Was the mortgage void under the statute of frauds? To be void under said statute, or at common law, it should be made to appear that it was either without consideration, or that it was *mala fide*, one or both. In other words, for a paper of the kind to be invulnerable, it should be based upon a valuable consideration and be a *bona fide* transaction. Now, there can hardly be a doubt, in fact, it is not denied, that Bollmann Brothers held a large claim on Richard, which this mortgage was intended to secure, so that one of the elements necessary to sustain it is present. Was it *bona fide*? or was it *mala fide* as to both parties to the instrument? because this is necessary to avoid it. What is *mala fides*? It must be an intent, not simply to assert

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one's own rights, but, in addition thereto, to defeat the rights of another, participated in, as we have said, by both parties to the instrument. A good illustration is found in the old case of *Lowry v. Pinson*,<sup>1</sup> where Pinson bought a tract of land paying full value for it, but one of the objects of the purchase was to enable his vendor to leave the country so as to escape the consequences of an action for damages against him by Miss Lowry for breach of marriage contract. Here Pinson was exercising a right of purchase, a right which belongs to every one. He paid full value for the land, but yet one object he had in buying it was to enable his vendor to defeat the action of Miss Lowry. The court very properly held that here was *mala fides*.

Now, is there any testimony in the case before us that Bollmann Brothers, while asserting their right to obtain a security for their claim on Richard, intended also to enable Richard to defeat, delay, and hinder his other creditors? The mortgage may have that effect, to the extent of the property mortgaged, but was this one of the intended effects? Did Bollmann Brothers conspire with Richard to use their claim for the fraudulent purpose of defeating the other creditors? Was there any secret trust, benefit, or advantage secured to Richard in consideration of the mortgage? We see nothing in the case but that Richard was insolvent, and that he embraced in his mortgage his entire visible goods and chattels in his store, and that it was the understanding that the mortgage was not to be recorded for forty days. This latter fact, though really of no harm to the creditors, is the only circumstance that has an appearance of the want of frankness and open, fair dealing. But this, in itself, cannot be held sufficient evidence of a fraudulent intent. Bollmann Brothers had the right to withhold their mortgage from the record, and we do not see that the creditors could be prejudiced in any way thereby, and consequently there could have been no such intent.

In the discussion of this case we have not been unmindful of the fact that the findings of a Circuit Judge below on questions of fact will not be disturbed if they are sustained by the manifest weight of the testimony.

<sup>1</sup>2 Bailey, 324; 23 A. D., 140.

It is the judgment of this court, that the judgment of the Circuit Court be reversed.

MR. JUSTICE MCIVER concurred.

MR. JUSTICE MCGOWAN dissented.

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FRAMPTON v. WHEAT.

1. Where a statute declares terms upon which vacant lands of the State may be granted, the courts cannot limit this provision to lands recently acquired from the Indians in one section of the State.
2. In action between private parties claiming a tract of land, a grant of State lands under the seal of the State and signed by her proper officers, cannot be held void for failure to comply with the conditions prescribed by statute to her officers in making grants, where it does not clearly appear that the conditions were present and that the officers disregarded them.
3. A statute prescribed that in granting vacant lands on navigable streams the grant should not include exceeding one chain on the river front for every four chains back. For this statute to defeat a grant, the party assailing the grant must show that the land was not so located, and that there was back vacant land enough to make a compliance possible; but where the grant is perfectly fair on its face, such testimony is inadmissible for the purpose of annulling it.

Before WALLACE, J., Charleston, March, 1886.

The opinion fully states the case.

*Messrs. H. E. Young and W. J. Whaley*, for appellant.

*Messrs. G. W. Dingle and Lord & Hyde*, contra.

October 6, 1887. The opinion of the court was delivered by MR. JUSTICE MCGOWAN. This was an action to recover "200 acres of marsh land, lying adjacent to and around Plum Island, in the parish of St. Andrews, and bounded on the north by the marsh lands of W. W. McLeod, east on Ashley River, south by New Town or James Island Creek, and west by other lands of the plaintiff." The plaintiff alleged that in 1882 the defendant

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wrongfully entered said premises, and put up notices thereon, and damaged plaintiff thereby to the extent of \$250. The defendant answered, denying that the plaintiff is the owner of the land described; but, on the contrary, claiming that she is "the owner in fee and fully possessed of all that tract of land known as Plum Island, lying westward of the mouth of New Town Creek and southward of Ashley River; containing six acres of high land and two hundred acres of marsh land, embracing the marsh land adjacent to and around Plum Island," &c.

The cause was heard before Judge Kershaw and a jury. The plaintiff introduced the following chain of title: In 1828, grant of the State to William McK. Parker for 779 acres of marsh land (covering the marsh land in dispute), situate on Ashley River, New Town Creek, and Wappoo Creek (plat attached). In 1830, William McK. Parker, the grantee, died, leaving his real property to his wife, Anna S. Parker, for life, and after her death to her children. Widow Anna S., executrix, applied to the court to sell the lands for payment of debts, and, under the sale, commissioner Gray conveyed to Sarah P. Parker 769½ acres of high land and 779 acres of marsh, bounded north on Wappoo Creek, &c. In 1847 Sarah P. Parker devised her plantation to her two grandsons, William McK. Parker and Edward L. Parker. In 1851 William McK. Parker and Edward L. Parker conveyed to W. W. McLeod 914½ acres of high land and 779 marsh on James Island. In 1879 the heirs of W. W. McLeod had partition of his estate, and there was allotted to Anna M., one of the children, "178 acres of high land and — acres of marsh land adjacent thereto along the Ashley River and James Island cut, bounded north on tract allotted to W. W. McLeod, east on Ashley River and James Island cut, south on James Island cut and land of Regina L. McLeod," &c.

The plaintiff also offered evidence tending to show that W. W. McLeod purchased and owned the "Parker place" on James Island, and was in possession of the same, high land and marsh land, until he went into the Confederate army and died about the close of the war; that for a short time the "Freedmen's Bureau" had possession of it, but in 1866, his executor, William M. Lawton, recovered possession; that in 1869, Anna M. mar-

ried James Frampton, and in 1879, the partition of the estate took place, and that the marsh land in question was within the portion assigned to the plaintiff, Mrs. Frampton, and that Frampton and wife have since that time rented the right to cut marsh upon it until 1882, when Mrs. Wheat, through her husband, ran off the laborers who were cutting marsh, and claimed the land as her own by posting up written notices, warning parties from cutting marsh or trespassing thereon, &c.

The defendant offered no evidence, but upon the close of the plaintiff's, moved for a non-suit, which was granted, the judge saying: "I must hold under the act of the legislature, making it incumbent upon the surveyor general to lay off four chains back for every chain on the river or stream front, that this grant is void, the requirements of the act not being done in this case. It is a familiar doctrine that prescription cannot run against the State in favor of a right which the State had no right to grant. Prescription is presumption of a grant. If the State has no power to make the grant, then no matter how long the possession may be, you cannot presume that done which the law says cannot be done. So I do not see how the plaintiff here could hold under the twenty years' possession, even if it had been made out. I am constrained to grant the non-suit."

From this order the plaintiff appeals to this court upon the grounds of error: "I. Because his honor erred in non-suiting plaintiff on the evidence submitted. II. Because his honor erred in holding that the grant put in evidence by plaintiff, and covering the land in dispute, was void upon its face. III. Because his honor erred in assuming that the State could not make this grant, and concluding from this that plaintiff could not acquire title by prescription to the land in dispute," &c.

There was no survey or plat of the marsh land in dispute, and therefore its precise location did not appear. It was admitted, however, that it was embraced in the grant to William McK. Parker of 1828, with its very meagre plat attached. The Circuit Judge granted the non-suit on the ground that this grant was void, and therefore the only question before this court is, whether in doing so he committed error of law. Our opinion is confined to that point and that alone.

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In 1784, soon after the State became independent by the treaty of Paris (1783), and while there was still much vacant land within her borders, the legislature passed an act "for establishing the mode and conditions of surveying and granting the vacant lands within this State" (4 *Stat.*, 592), the 12th section of which was in these words: "That on all creeks and rivers navigable for shipping or boats, whereon any vacant lands shall lie, the deputy surveyors shall, and they are hereby directed to, lay off the same by measuring four chains back from such river and creek for every one fronting on and bounded by the same; and all surveys not made and regulated by this rule, and any grant which may be obtained thereon, are hereby declared to be null and void to all intents and purposes," &c. In March, 1785, and again in October of the same year, this act was amended in certain particulars, not, however, touching the matter of the section above quoted. In 1791, another original act was passed, "for establishing the mode of granting the lands now vacant in this State, and for allowing a commutation to be received for some lands that have been granted." 5 *Stat.*, 168. The preamble of this act declared that "whereas all the valuable lands in this State have already been granted," &c., and it then made certain provisions reducing the cost of taking out grants, &c., but made no reference to the aforesaid 12th section of the previous act of 1784.

The grant of 1828, here in question, was issued expressly and in terms under this act of 1791, which made no reference to the section aforesaid. We have not been referred to any authority that the 12th section of the act of 1784 was ever expressly repealed until the adoption of the general statutes in 1872, when the whole act was so repealed, and is no longer the law of the State. Nor have we been referred to a single case during the hundred years since its passage in which the point now before the court was made and judicial construction given to the section. From these circumstances, and its unusual and peculiar provisions, the suggestion was made that the section must in some way have been repealed, or at least have become obsolete from non-user. But whilst we think it probable that it fell into disuse and was disregarded, after most of the valuable lands of the State had been granted, nothing has appeared showing that it was not

in active operation in 1828, when the grant in question was issued. It was also argued from the history of those early times, and the condition as to vacant lands of the new sovereign State, that the aforesaid section was never intended to apply to the old settled seaboard portion, but to lands in the upper part of the State, then recently acquired from the Cherokee Indians. But the court could not venture so to alter and limit the general terms of the provision.

In the view, however, that the section had not been repealed or become obsolete in 1828, and applied to a grant of marsh land, we cannot think that the defendant had the right to have this grant declared void. The grant was regular in form, under the broad seal of the State, and successive parties had held under it such possession as the character of the property permitted, for nearly sixty years without notice of any alleged defect in it. It must be kept in mind that this is not a proceeding in the Court of Caveats or elsewhere to have the grant revoked upon the ground that it was improvidently or illegally issued by the land office. But the question arises in a private suit between parties claiming the land. It does not clearly appear what title the defendant sets up, but it does appear that the plaintiff and those under whom she claims have held under it as *bona fide* purchasers for valuable consideration for at least half a century; and it is not quite certain that she could not raise the question whether, under these circumstances, the solemn act of the State in issuing the grant could be thus collaterally assailed. See *Polk's Lessee v. Wendell*, 5 *Wheat.*, 293, and cases referred to.

But it seems that there are cases even between private persons in which a grant may be assailed, as being upon its face absolutely void as to all the world; as, for instance, where the State has no title to the thing granted, or where the officer has no authority to issue the grant, &c. In such cases the validity of the grant is necessarily examinable at law. We do not think that this grant was absolutely void upon its face; but as the scope of the defendant's objection seems so to regard it, we will consider the question. There is no pretence here that the State did not have title to the thing granted, as it did not in the case of *Patterson v. Jenks* (2 *Peters*, 227), where the State of Georgia

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had issued a grant upon a survey of land, part of which lay beyond the Georgia State line, and upon the Indian hunting grounds. It was there held that the grant was void *quoad* the lands which lay beyond the State line, and as to which the State had no right to issue a grant. Nor can it be said here that the State had no right to issue the grant, for the reason that the land was marsh. See *The State v. Pacific Guano Company*, and the case of *The Oak Point Mine*, in the appendix, 22 S. C., 50, 593. Nor can it be claimed that the officer, Governor John Taylor, had no authority to issue the grant. The premises were grantable, the grant was by the proper officer and in due form; and we see nothing on its face to authorize the court, in a collateral proceeding, to declare it void.

It is urged, however, for the defendant, that the grant was made void, not by anything upon its face, but by a fact prior to its issue in point of time, and lying behind it—that it was an indispensable prerequisite that the survey on which it issued should have been made in accordance with the section so often referred to, which was not done; that the deputy surveyor did not “measure four chains back from the river for every one fronting on the same.” How was this alleged fact made to appear? The court requires clear and strong proof to justify it in setting aside an act of the State authorities, especially where property is held under it on the faith reposed in the State. The defendant offered no evidence, and therefore there was no proof upon the subject, unless the vague plat attached to the grant furnished it. We do not think that was sufficient to rebut the presumption that the officers did their duty. To make out the allegation so as to overthrow the grant, it seems to us that it was necessary to prove affirmatively at least two things: first, that the surveyor did not locate the land as required by the section aforesaid; and second, that there was sufficient vacant lands adjacent to the survey to make practicable a compliance with the provision which manifestly contemplated vacant lands sufficient for that purpose, lying back of the survey. Unless there was such vacant land back of this survey, we think it was not a case for the application of the rule of the section; otherwise there might be an isolated piece of vacant land lying on a stream which could never be located or



granted; and we suppose that such could not have been the intention of any part of an act, the preamble of which declared that "the granting of the vacant lands of this State will be greatly conducive to its strength and prosperity, by increasing the agriculture and population thereof."

But the grant being perfectly fair upon its face, would the testimony indicated above have been admissible for the purpose of annulling it? As to all acts necessary to be done prior to the grant and leading up to it, we must assume that all the officers did their duty. The authorities and good policy concur in the doctrine "that the court will not question the validity of a grant which appears regular and legal on its face." *Mounce v. Ingram*, 1 *Brev.*, 66; *Trapier v. Wilson*, 2 *McCord*, 191; *Huggins v. Brewer*, 2 *Bail.*, 26; *Polk's Lessee v. Wendell*, *supra*; *Patterson v. Jenks*, 2 *Peters*, 227. In the case of *Polk's Lessee*, Judge Johnson, of the Supreme Court, said: "Long experience had satisfied the mind of every member of the court of the glaring impolicy of our admitting an inquiry beyond the dates of the grants under which lands are claimed," &c. And in the case of *Patterson v. Jenks*, *supra*, Chief Justice Marshall said: "Undoubtedly the presumption is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts it to support his objections. The whole burden of proof lies on him; but if his objections depend on facts, those facts must be submitted to the jury. If opposing testimony be produced, that testimony also must be laid before the jury; and the court may declare the law on the facts, but cannot declare it on the testimony. \* \* \* In the case of *Polk's Lessee v. Wendell* (9 *Cranch.*, 87; 5 *Wheat.*, 293), this court decided that a grant raises a presumption that every prerequisite has been performed; consequently that no negligence or omission of the officers of government anterior to its emanation can affect it," &c.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the cause be remanded to the Circuit Court for a new trial.

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## JAUDON v. DUCKER.

1. In construing a will, the first and great object is to ascertain the intention from the paper itself in the light of the circumstances surrounding the testator when he wrote it.
2. A testator, possessed of an estate consisting almost entirely of lands, bequeathed three pecuniary legacies and devised a small part of his realty, and then bequeathed and devised the "rest and residue of his estate, real and personal," to other parties. *Held*, that the pecuniary legacies were a charge upon the residuary estate.

Before HUDSON, J., Charleston, March, 1887.

This was an action by John C. Jaudon, assignee of Boy D. Sonnichsen and others, pecuniary legatees of Henry Williams, deceased, against the executor and other beneficiaries under said will. The opinion states the case.

*Messrs. Lord & Hyde*, for appellants.

*Messrs. Hayne & Ficken*, contra.

October 6, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. On January 24, 1884, Henry Williams, of Charleston, executed his last will and testament, by the first clause of which he bequeathed \$1,000 to Dorothea Catrina Sonnichsen, and to Peter F. Sonnichsen the same amount, and to Boy Diedrich Sonnichsen \$2,000. By the second clause he devised and bequeathed to his wife for life with remainder over, his residence and household furniture, and eight lots of land with the buildings thereon, "situate on Williams court, in Charleston." And by the third and fourth clauses he provided as follows: "It is my will that as soon as possible after my death the rest and residue of my estate, real and personal, shall be divided into two equal parts, the said division to be made by three appraisers, one to be appointed by each of my daughters hereinafter named, and the third by the trustee hereinafter appointed. One of the said equal parts of the rest and residue I give, devise, and bequeath unto Christopher G. Ducker, his

heirs, executors, administrators, and assigns, upon the trusts, nevertheless, and for the ends, uses, intents, and purposes following, that is to say, upon trust that he, the said Christopher G. Ducker, shall and do pay unto Alice Barberry, wife of John B. Miller, the dividends, interest, and annual product of the said one-half part of the rest and residue when and as the same shall become due and payable, for and during the life of the said Alice Barberry, and from and after the death of the said Alice in trust," &c. Precisely the same provision was made as to the other moiety of "the rest and residue" of the estate in favor of his other daughter, Henrietta Ann, wife of Luder Sahlmann, &c.

In the eighth clause the said Christopher G. Ducker was appointed executor, with full power to sell and convey any and all parts of the estate, "real or personal, at public or private sale, for the purpose of making a partition and division of the same as provided."

On November 4, 1885, the testator executed a codicil to his will, by which he made an additional pecuniary legacy of \$1,000 in favor of John Sonnichsen, and on December 4, 1885, died.

The executor qualified, and, as we suppose, delivered to the widow the lots and household furniture specifically devised and bequeathed to her; but finding that the remainder of the personal property was appraised at only \$1,399.68, and the claims against the estate amounted to \$4,865, and the real estate (exclusive of that specifically devised to the widow) was valued at \$40,340, he declined to pay the several pecuniary legacies given by the will, upon the ground that they are only payable out of the personalty of the estate, which is not even sufficient for the payment of the debts. Thereupon this proceeding was instituted for the recovery of the legacies, the legatees claiming that the legacies are charged upon the real as well as the personal property of the estate, except that specifically devised to the widow.

The cause came on to be heard by Judge Hudson, who held principally upon the authority of *Moore v. Davidson* (22 S. C., 94), that the pecuniary legacies are chargeable upon the real as well as the personal property disposed of by the residuary clause of the will; that "the rest and residue of the estate, real and

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personal," which was given to the trustee, Ducker, for the daughters, meant that which might remain after the specific provision for the widow and the legacies had been carved out of the estate, &c., and ordered the executor, Ducker, to pay the legacies within a time named, or in case of his failure to do so, that so much of the real estate as might be necessary for that purpose be sold at public outcry, &c. From this decree the defendants appeal to this court upon the ground, "that the presiding judge erred in holding that the legacies given to the plaintiffs in his will by the testator, Henry Williams, are a charge upon 'the rest and residue' of the real estate of the said testator," &c.

In the construction of a will, of course, the first and great object should be to ascertain the intention of the testator, and that intention must be gathered from the paper itself, assisted, it may be, by the circumstances which surrounded the testator at the time of its execution, such as the state of his family and condition of his property, &c. Now, if the will of Henry Williams were read to one, having no knowledge of the formal rules of construction, but thoroughly familiar with the English language and the proper force of words, we cannot doubt his response would be, that the testator intended the specific gift to the widow and the pecuniary legacies first given to be first and at all events provided for out of the whole estate, without any reference whatever to what proportion of it was realty and what personalty, and that only what remained of it—"the rest and residue of the estate, real or personal"—should go to the trustee, Ducker, for the daughters.

It is, however, contended that according to certain rules of construction, the lands are not the proper fund from which to pay money legacies; and that the words so often repeated in the will, "rest and residue of my estate, real and personal," are not in this State sufficient to charge the legacies upon the large real estate, which must all go undiminished to the trustee for the two daughters, leaving the pecuniary legacies entirely unpaid. We cannot agree that such construction would carry out the intention of the testator, or is imperatively demanded by any rule of interpretation. It may be true that formal rules may be useful in ascertaining the intention, but certainly not when they defeat the

manifest intent. By the old English law personal property was considered of little consequence in comparison with real estate, which is more stable in character, and there was a constant solicitude to protect the real estate for the heir ; but in later times, and especially in this country, personalty has increased in its relative importance. If we must assume that the testator knew the difference between pecuniary legacies and devises of real estate, and the general rule as to the fund out of which legacies should be paid, we must, at the same time, assume that when the codicil was executed in November, 1885, just one month before his death, the testator had at least such general information of the condition of his own estate as to know that it consisted almost entirely of lands, and that unless the legacies, which he was so careful to make, were to be paid out of the proceeds of real estate, they would not be paid at all.

So far as concerns the intermingling of the two kinds of property, this case seems to us to be identical with that of *Moore v. Davidson* (22 S. C., 92), cited by the judge below. The words in that case were, "the remainder of my property, both real and personal," while in this they are "the rest and residue of my estate, real and personal." In delivering the judgment of the court in that case, Mr. Justice McIver said what applies with equal force to this: "Nor is there any warrant for applying the term 'remainder' to the personal estate alone. It is true, that in the absence of any direction to the contrary, the legacies, as well as the debts, would be payable out of the personal estate, and the testator must be presumed to have known that this was the law ; but notwithstanding this, having, as he did, the right to make other provision for the payment of the debts and legacies, what did he do ? He made no distinction whatever between his real and personal estate ; but, on the contrary, blended it into one common mass and gave it, or rather what remained of it (after the payment of the legacies and debts), to his sons. His language is: 'I will and bequeath (my debts being paid) the remainder of my property, both real and personal, to my sons.' Where is the warrant for confining the term 'remainder' to the personal property alone ? The testator has not done so, but, on the contrary, according to strict grammatical construction, the term 'remainder'

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applies equally to the real as well as to the personal property," &c. Substituting for the word "remainder" the phrase "rest and residue," and what is above said applies precisely to this case.

But it is urged that in the case of *Moore v. Davidson*, there was no preceding devise of real estate, and the use of the word "remainder" could have reference only to the diminution caused by the payment of the legacies; whereas in this case there was a preceding gift of both real and personal estate to the widow, and the words "rest and residue" must be considered as having reference alone to that provision. We are not able to say that this circumstance should absolutely control the construction, for the pregnant fact still remains that the testator himself blended his real and personal property together as one mass, and that mass was known to him to be the only fund out of which the legacies could be paid, if paid at all. As it seems to us, the terms of the will, construed in the light of the surrounding circumstances, show that the testator, in disposing of his estate, considered it as a whole, without regard to nice distinctions between the realty and personalty of which it was composed. This he had the right to do.

We think this construction is not in any manner inconsistent with the doctrine announced in the case of *Laurens v. Read* (14 Rich. Eq., 263), but, on the contrary, is in exact conformity thereto. In that case the learned justice, who delivered the opinion of the court, undertook to arrange the cases in which lands devised have been charged with the payment of legacies under six distinct heads, several of which, as it seems to us, would embrace this case—certainly the *sixth*, which is stated as follows: "Where, at the making of the will, the testator must have known that the legacies could not be paid without the aid of the real estate. This head is plainly illustrated by the case of *Nichols v. Postelthwaite*, 2 Dall. (Pa.), 131. To it also may be referred the case of *Hassanclever v. Tucker*, 2 Binn., 525, where it is said that 'the personal estate was nominally adequate to pay debts and legacies, but was really insufficient,' and 'if the legacies were not to be paid out of the land, they were a mockery of benevolence,' " &c.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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IHLEY v. PADGETT.

1. A deed of conveyance executed by an infant is not void, but unless there has been a confirmation is voidable by himself after attaining his majority, his heirs, or those entitled to his estate.
2. Where an infant joined in the execution of a deed of conveyance to a tract of land in which he held an interest in remainder, and the proceeds of this sale were, in part, invested in another tract of land of less value, the title to which was taken, in part, in his name; where such infant, after attaining his majority, lived upon said purchase and mortgaged his interest therein, and made no complaint for fourteen years, and until the death of the life tenant—his acquiescence in the deed signed by him when an infant was such as to fairly authorize the inference of his assent to it.
3. If an infant executes a deed of conveyance of his interest in remainder in a tract of land, he may institute action to vacate such deed as soon as he attains his majority, notwithstanding he has no right to the possession of such interest until the life tenant dies.

Before WITHERSPOON, J., Hampton, September, 1886.

The opinion fully states the case.

*Messrs. Warren & Warren*, for appellant.

*Mr. C. J. C. Hutson*, contra.

October 6, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. Nancy Ihley had a life estate in a plantation known as "Rice Hope" under her father's will, which gave it to her, "her heirs and assigns, in trust, nevertheless, that all the productions of rent of said land be applied to the use of the said Nancy and her children during the said Nancy's life time, and at her death to be equally divided among her children share and share alike, be they few or many," &c. Nancy had a husband, S. L. Ihley, and several children, among whom was

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George C. Ihley, the plaintiff. About the year 1870, Nancy Ihley and her children, who were all grown up and apparently of age, negotiated a sale of "Rice Hope" to one Macon B. Allen at the price of five dollars per acre, and in consideration thereof, the mother and all her children, George C. and his three sisters, united in a conveyance of the plantation to him, under whom the defendants hold. At that time there was no claim that the plaintiff was under age or unwilling to sign the deed; but, on the contrary, he received \$25 for going in the night to summon the heirs and witnesses who were to sign the deed. It seems that without objection the purchase money was delivered to the father, S. L. Ihley, and \$1,200 of it, some time after, was used in the purchase of another place, known as "Log Hall," and the title made to the mother, Nancy, George C., the plaintiff, and one of his sisters jointly, and the family removed to this new place, and cultivated the same.

In 1885, Nancy Ihley, the mother, died, and in January, 1886, George C. Ihley, the youngest child, instituted this action to recover his undivided share of the Rice Hope plantation; alleging that, when he, with the other children, signed the deed of Rice Hope to Allen, in 1870, he was not quite twenty-one years of age, having been born March 12, 1850, and the deed executed in May or June, 1870; that he signed the deed "through persuasion and under compulsion," and had never received anything for his interest; and praying that the conveyance from himself to Macon B. Allen be declared void and the same be delivered up to be cancelled, &c.

The cause came on to be heard by Judge Witherspoon, who, having taken the testimony which is in the "Brief" decreed that the deed originally was not void, but merely voidable; that it was not executed by the plaintiff through persuasion or compulsion; and that the plaintiff, after he attained his majority, had confirmed it, by accepting in lieu thereof an interest in the "Log Hall" place, and by acquiescing in the sale for more than fourteen years, from March, 1871, when he came of age, to January, 1886, and he therefore dismissed the complaint.

From this decree the plaintiff appeals to this court upon the ground: "That his honor erred in deciding that the plaintiff,



George C. Ihley, confirmed the deed executed to Macon B. Allen of the Rice Hope plantation during his minority, after he reached his majority, by long acquiescence and by receiving his proportionate share of said plantation or its equivalent in another tract of land." &c.

Clearly, the plaintiff cannot avoid his deed upon the ground that there was coercion or positive fraud practised to induce him to sign it. There is not the slightest evidence either of coercion or of fraud in obtaining the conveyance. His appearance did not afford the evidence that he was under age. It was not shown that he was lacking in ordinary capacity. He assisted in making arrangements for the execution of the deed, and the purchaser Allen did not know that he was a minor.

There is no good objection to the deed, unless it arises out of the fact, that the plaintiff was by a few months under age when he, together with the other members of the family, executed it. Did the minority of the plaintiff when he signed the deed make it as to him absolutely void or only voidable? Without going into the question as to what acts of a minor are absolutely void and what are voidable only, it will be quite sufficient for the purposes of this case to say that it is well established that, "All gifts, grants, or deeds made by infants by deed or matter in writing, and to take effect by delivery of his hand, are voidable only by himself, his heirs, or those who are entitled to his estate." *Zouch v. Parsons*, 3 *Burr.*, 1794; *Lester v. Frazer*, 2 *Hill Ch.*, 541; *Cheshire v. Barrett*, 4 *McCord*, 241; 17 *A. D.*, 735. From its very nature a thing only voidable needs no positive confirmation, but stands good until impeached by a proper party. In the first instance, confirmation has no proper application to it, but when there is an effort to avoid the act, it becomes important to inquire whether there has been confirmation; for if so, the matter has passed beyond the control of the party, and is no longer voidable. The plaintiff here seeks to avoid his deed upon the ground that he was under age when he executed it, and the question is whether he had already confirmed it after coming of age before the application was made.

In the case of *Norris v. Vance* (3 *Rich.*, 165), it was held that there may be confirmation of an infant's act in either of

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three ways: "There must be after he attains his majority, with a full knowledge of his rights, (1) acquiescence from which assent may be fairly inferred; (2) an adequate benefit enjoyed which has grown directly or indirectly out of the contract; or (3) some direct act of express assent." Does this case come under any of the heads of this classification? We cannot say that the evidence shows any direct act of express assent by the plaintiff to the sale and conveyance of Rice Hope after he attained his majority. It does, however, appear that a part of the price of Rice Hope (\$1,200) was applied in the purchase of another place (Log Hall), the title to which was executed to the plaintiff, his mother, and one of his sisters jointly, and that they removed to the new place and resided there many years, claiming it as their own; and that the plaintiff, becoming embarrassed in his affairs, mortgaged his interest therein to secure a debt of his own. We cannot doubt that the plaintiff was cognizant of these facts and enjoyed his interest in the new place, which arose "directly" out of the sale of Rice Hope, as, in part at least, a substitute for the place sold. See *Belton v. Briggs*, 4 *DeSaus.*, 465; *Irvine v. Irvine*, 9 *Wall.*, 626. In the case from DeSaussure which was somewhat like this, it was said: "If Thomas Briggs (former infant) did not mean, in accepting the Dobbins tract from his mother, to confirm her acts, he meant to commit a fraud, which the court will not sanction. See *Ambler*, 419; 3 *Atk.*, 607; 1 *Vern.*, 182, and 2 *Vern.*, 225."

It is urged, however, that even if this be so, the third of Log Hall was not a benefit "adequate" to plaintiff's interest in Rice Hope, and for that reason its acceptance could not operate as a confirmation of the deed of the latter. While it may be, in order to raise an implied assent by substitution, that the property accepted should bear some proportion to that sold, it should not be overlooked that the question is really not one of payment, but as to what was the intention of the party. But without regard to the relative value of plaintiff's interest in Log Hall, we concur with the Circuit Judge that the acquiescence of the plaintiff in the conveyance to Allen was such as "to authorize fairly the inference of his assent to it." He was twenty years of age when he voluntarily signed the deed in 1870. Attaining his majority

in 1871, from that time until 1886, when he instituted this proceeding to set aside his conveyance, over fourteen years, he held his interest in the Log Hall tract and acquiesced in the deed of Rice Hope to Allen. It was very properly conceded in the argument, that acquiescence for such a period of time would have been amply sufficient to make out a case of implied confirmation, if there had been no insuperable obstacle in the way of his avoiding the deed during the life of his mother.

But it was urged that there was such obstacle; that the plaintiff being only a remainderman, had no right to claim actual possession of any portion of the Rice Hope plantation until after the death of Mrs. Ihley, the life tenant, and as a consequence he could not make application to have his deed annulled until that time (1885), and, that being the case, it could not properly be said that he "acquiesced" in that which it was out of his power to avoid. It may be that the death of the mother was the time at which the land was to be divided among the children. But we do not understand that the plaintiff was thereby precluded from making application to set aside his deed, signed as alleged when he was under age, at any time after he attained his majority. The two matters, in point of time, are not necessarily identical. He had a salable interest in Rice Hope during the life of his mother, and having conveyed that interest to Allen, we know of no reason why he could not have assailed the deed, executed when he was under age, at any time after he came of age, and that, whether his mother, the life tenant, was then living or dead. In the view that it was his intention to make that question, it was due to fair dealing, to the purchasers and to all concerned, that it should have been made promptly after he attained his majority. We do not think it could alter the case if, as alleged, the plaintiff was under the impression that he could not make the question until after the death of his mother, the life tenant. He certainly had full knowledge of all the facts, and after he had reached his majority, he must, like all other persons, be assumed to have known the law; and if he did not claim his rights, others cannot be made to suffer the consequences.

We concur with the Circuit Judge that the acquiescence of the plaintiff in his deed to Macon B. Allen for fourteen years after

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he attained his majority, whilst enjoying his substituted interest in Log Hall, must be considered as a confirmation of the same. "The rules with respect to what shall amount to a confirmation of a sale made by an infant, after he attains full age, are better ascertained. A very slight circumstance, demonstrating his assent, will bind him, or any act by which his assent is manifested. Thus if an infant purchase land, and continue in possession after he attains full age, it will be regarded as a confirmation of the purchase; or if he make exchange of the lands, or if he take a lease rendering rent and continue in possession several years after he comes of age, it is a confirmation of the contract *ab initio*, and he is bound for the rent in arrear. In short, any word or action from which his assent to the contract may fairly be deduced, will be regarded as a confirmation." *Cheshire v. Barrett, supra*.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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GLOVER v. BURBIDGE.

1. In an action at law this court has no power to review a decision of the Circuit Judge refusing to grant a new trial, when the motion was based on an alleged insufficiency of testimony.
  2. Naked depositaries are liable only for gross negligence, or a lack of ordinary care; and where a party makes a special deposit of money in the safe of a merchant, whose known habit is to permit trusty clerks to open his safe, the Circuit Judge erred in instructing the jury that the depositary would be liable for the loss of this money if it was abstracted out of the safe by one of their employees.
- MR. CHIEF JUSTICE SIMPSON concurred in the result, and MR. JUSTICE McIVER dissented.

Before KERSHAW, J., Colleton, March, 1887.

This was an action by James S. Glover against John W. Burbidge, survivor of John W. Burbidge & Co., and J. F. Lucas, executor of J. C. Lucas. The opinion states the case.

*Mr. C. C. Tracy*, for appellants.

*Messrs. Edwards & Son*, contra.

October 6, 1887. The opinion of the court was delivered by  
MR. JUSTICE MCGOWAN. John W. Burbidge and J. C. Lucas were merchants at Walterboro, under the name and style of John W. Burbidge & Co., and used in their business a Stern & Marvin's safe with two keys, each member of the firm carrying one. On December 14, 1880, the plaintiff, James S. Glover, being about to leave the town, went into their office, and for convenience and safety deposited with John W. Burbidge two hundred dollars, and took from him the following acknowledgment: "\$200. Due James S. Glover or bearer two hundred dollars left on deposit. (Signed) John W. Burbidge & Co." The money was counted, put into an envelope with Glover's name upon it, and placed in one of the pigeon holes of the safe. Nothing more concerning the matter appears until after the death of Lucas and the settlement of his estate, when, as the plaintiff states, he was looking through a pocket-book for some old notes, and "found this note among others, some of which were out of date." He then, in 1886, presented the paper to John W. Burbidge for payment, which was refused, and he thereupon brought this action.

The partner, Lucas, having died in the meantime, his executor, John F. Lucas, denied each and every allegation of the complaint, pleaded that his testator was never liable for the individual transaction of his partner; but if so, he had fully administered the estate of his testator. The surviving partner, Burbidge, admitted the deposit, but alleged that no consideration was received for it; that the money was taken on deposit purely as a matter of kindness and accommodation for a few days; that the package containing the money was deposited in the safe and was never broken by either member of the firm or by their authority; and that if the package was not handed back to the plaintiff, it was lost without negligence upon the part of the firm.

The cause came on for trial before Judge Kershaw and a jury. The testimony is printed in the Brief, and it appears that there

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was really no evidence of importance upon the point in issue, except that of the parties—the plaintiff, Glover, and the surviving partner, Burbidge. The other party to the transaction, J. C. Lucas, was dead, and of course his lips were closed.

Under the charge of the judge the jury found for the plaintiff two hundred dollars, and the defendant appeals to this court upon the following grounds: “I. Because his honor charged the jury that if the money was abstracted by one of the defendants’ servants, who were occasionally sent to the safe, defendants would be liable as naked depositaries, which it is respectfully submitted was error. II. Because his honor failed to charge the jury as requested by defendants, that if the jury believed from the testimony that no consideration of any kind had been given the defendants for the instrument in writing herein sued on, that the defence of *nudum pactum* had been made out, which it is respectfully submitted was error. III. Because his honor failed to charge the jury as requested by the defendants that the gross negligence necessary to charge defendants must amount to deceit or fraud, which it is respectfully submitted was error. IV. Because his honor failed to define gross negligence to the jury, which it is submitted was error. And at the same time and place will move the court to reverse the order of his honor refusing to grant the new trial moved for, on the following grounds: 1 Because his honor should have held that there was no evidence to sustain the verdict. 2. Because his honor should have held that the jury had disregarded both law and facts in their verdict, inasmuch as there was nothing to show either deceit or fraud on the part of the defendants,” &c.

This is an action at law, and it surely cannot be necessary to repeat what we have so often held, that this court has no authority to review a decision of the Circuit Judge refusing to grant a new trial upon the alleged insufficiency of the testimony as to the facts.

Several of the grounds of appeal allege that the judge refused to charge certain “requests” made. We have not been able to find such requests in the “Case;” but from the view which the court takes, it will not be necessary to consider any of the grounds but the first, viz., “That his honor charged the jury

that if the money was abstracted by one of the defendants' servants, who were occasionally sent to the safe, defendants would be responsible as naked depositaries." What the judge did say is the following: "Well, now, if that is the nature of the transaction (and it is for you to say whether it is or not), then, though it was not paid back again, they could not be made responsible, unless it appeared that they had not used even ordinary care. They would, in that case, be liable for what is called gross negligence. If they used it for their own purposes, or if it was abstracted out of the safe by any one of their servants or employees, who are occasionally sent to the safe, or if it appeared to be kept in such a loose and careless manner as to amount to gross negligence—only in these conditions would they be liable," &c.

We agree entirely with the announcement here made of the general principle, that naked depositaries are only liable for gross negligence or a lack of ordinary care. But we think that in enumerating the matters which would amount to gross negligence, the rule, as applied to employees sent to the safe, was stated somewhat too positively and broadly. In the connection here, the question was not whether a principal is responsible for the criminal act of his servant, or, if so, to what extent; but it was simply whether the defendants exercised ordinary care in reference to the deposit, which, as it seems to us, was to be determined by what was their business habit in regard to entering their safe. When the plaintiff voluntarily made the defendants his accommodation depositaries for a day or two, he must be taken to have done so with reference to the fact that they had a safe, and to their known habits of business in regard to it. If it was the habit of the defendants occasionally, as found necessary or convenient, to send a trusty clerk to the safe with a key, we can hardly suppose that, by accepting the deposit, they bound themselves to a higher degree of care than they habitually exercised in their own business, and in reference to their own cash. The very question was as to ordinary care—whether the occasional sending of a trusty clerk to the safe was, under the circumstances, less than ordinary care, and necessarily gross negligence. "When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of bailee, and of course makes

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him answerable only for gross neglect." *Story Bail.*, § 23. "If goods deposited are stolen by the servants of a private depositary, without gross negligence on his own part, he is not chargeable any more than he would be if the theft were by a stranger." *Ibid.*, § 88; *Foster v. Essex Bank*, 17 *Mass.*, 479, 9 *A. D.*, 168. "The fidelity which the depositary ought to apply to the care of the thing confided to him, should be the same which he applies to the care of his own." *Story Bail.*, § 65.

In any view that can be taken, it seems to us that the question was not one purely of law, but, to a large extent at least, one of fact, and should have been left to the jury.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the cause remanded to the Circuit Court for a new trial.

MR. CHIEF JUSTICE SIMPSON concurred in the result.

MR. JUSTICE McIVER. I dissent. It seems to me that the paper sued on was an ordinary due bill, the additional words—"money left on deposit"—only serving to show the consideration. If this be so, then I am not prepared to admit that it was competent for the defendants to show by parol evidence that the contract was of a different character. I am inclined to think, therefore, that the plaintiff was entitled to recover.

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JOHNSON v. JOHNSON.

1. In action for the recovery of the possession of real property, the plaintiff can recover only the strength of his own title as it existed at the time of action brought.
2. Where the mortgagor empowers his mortgagee on default to make sale of the mortgaged lands, the courts will not avoid the power, but will closely scrutinize the sale made thereunder.
3. Where sale is made by the mortgagee or his assigns under a power conferred in the mortgage deed, the legal title remains in the mortgagor until deed of conveyance is executed under the power by the mortgagee or his assigns, in the name of the mortgagor. A deed in the name of the mortgagee or his assigns will not transfer the title.



4. Such a power, being a part of the contract and based on a valuable consideration, cannot be revoked by the mortgagor, but the power not being coupled with an interest ceases at the instant of the mortgagor's death, and cannot be thereafter executed.
5. An action for the recovery of real property claimed by plaintiff to have been purchased by her under a power contained in a mortgage deed, cannot be converted into an action for a foreclosure of the said mortgage.

Before ALDRICH, J., Laurens, March, 1887.

The opinion fully states the case.

*Messrs. Holmes & Simpson*, for appellants.

*Messrs. Cunningham & Harris*, contra.

October 6, 1887. The opinion of the court was delivered by MR. JUSTICE MCGOWAN. On November 17, 1879, one Joshua M. Johnson, in order to secure a note for \$150, due to John H. Neighbors, executed to him a mortgage of a tract of land, containing 114 acres, and Louisa Johnson, the wife of the said mortgagor, relinquished her dower in the said premises. The mortgage contained a power of sale as follows: "But in case of the non-payment of the said sum, &c., \* \* \* then, and in such case, it shall and may be lawful for the said John H. Neighbors, his heirs, executors, administrators, and assigns, and the said Joshua M. Johnson doth hereby empower and authorize the said John H. Neighbors, his heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, at which sale they, or any of them, shall have the right to become purchasers of the said premises, and on such sale to make and execute to the purchaser or purchasers his, her, or their heirs or assigns forever, a conveyance in fee of the said premises, free and discharged from all equity of redemption, right of dower, and every other encumbrance," &c., &c. On January 6, 1881, the mortgagee, Neighbors, assigned the note and mortgage to the plaintiff, Margaret Johnson, and in the year 1882 Joshua M. Johnson, the mortgagor, died intestate, seized and possessed of

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the said premises ; leaving as his heirs at law, his widow, Louisa Johnson, and five minor children, who are the defendants.

On December 22, 1883, after the death of the mortgagor, Margaret Johnson, the assignee of the note and mortgage, advertised the land for sale in the town of Clinton, County of Laurens, at 12 o'clock m., of January 12, 1884, by posting written notices of the sale on the door of the court house, and at three other public places of the county. This advertisement made no reference to the previous death of the mortgagor, Joshua M. Johnson, or mention of his widow and children, his heirs at law. At the sale, the land was bid off by one Pitts for \$325, who refused to comply with the terms of sale, and James L. Simpson agreeing to take his bid, on January 24, 1884, a deed was made to him by the plaintiff in her own name, without any reference to the previous death of Joshua M. Johnson, the mortgagor, or mention of his heirs, the widow and children. This deed was recorded. It seems that the sale was reasonably well attended, the widow, Louisa Johnson, with others, being present ; and that the land sold for what was considered a fair price. Simpson agreed with the widow, Louisa, that she might remain on the land for the remainder of the year for a certain rent.

Simpson, to whom the land was conveyed, never paid the purchase money, but on January 5, 1885, in pursuance of a previous agreement to that effect, conveyed it back to Margaret Johnson, who credited \$195.90, the amount due on the mortgage debt owned by her as assignee, and brought this action against the heirs at law of the deceased mortgagor, Joshua M. Johnson : 1. To confirm the sale and conveyance made by her as assignee. 2. For leave to pay into court the excess of the purchase money over the mortgage debt. And 3. That the plaintiff may be put into possession of the said premises, and for the costs of the action, &c. The minor defendants made formal answer, but the widow, Louisa Johnson, answered, resisting the claim, upon the ground that she and her children were in possession as the heirs at law of the mortgagor ; and that they were never made parties to any proceeding of foreclosure, so as to divest them of the legal title ; and the plaintiff, Margaret Johnson, has no title under the illegal and void sale by her, and that her action should be dismissed.

The cause was referred to the master, C. D. Barksdale, Esq., "to ascertain and report on all the issues of law and fact involved." He took the testimony, which is in the Brief, recommended that the prayer of the complaint should be granted; and his honor, Judge Aldrich, confirmed the report. From this decree the defendants appeal to this court upon the following grounds:

"1. Because his honor erred in holding that the advertisement for sale was sufficient, and that the sale was valid.

"2. Because he erred in not holding that the parties having the equity of redemption, should have been named in the advertisement of sale.

"3. Because he erred in not holding that the sale, under power to sell in a mortgage at public auction or vendue, should conform to public sales, when made under foreclosure of mortgage by order of court.

"4. Because he erred in holding that the land sold for a fair price.

"5. Because he erred in not holding that the sale was invalid, because the person who bid off the land refused to comply, and the person to whom the deed was claimed to have been executed never complied nor paid the purchase money, which, in fact, has never been paid.

"6. Because he erred in not excluding parol testimony to establish the transfer of the bid of John H. Pitts to James L. Simpson; and also in not holding that there was no legal transfer made under the statute of frauds.

"7. Because he erred in not holding that the execution of the deed from Margaret Johnson to James L. Simpson was not proved, and in not excluding the testimony taken before trial justice Irby.

"8. Because he erred in not holding that the deed of Margaret Johnson to James L. Simpson was invalid, because executed in the name of the mortgagee, when it ought to have been executed by the mortgagee, as attorney in fact, in the name of the parties in whom was the legal title.

"9. Because the mortgagor having died, he erred in not holding that the mortgagee, under the terms of the mortgage, had no

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right to sell and bar the rights of the infant defendants, heirs at law, and others, creditors, without a regular foreclosure by order of court.

"10. Because he erred in holding that Louisa Johnson was estopped from denying the validity of the sale by her presence at the sale, or by undertaking to rent, if the deed was afterwards improperly executed, and she was ignorant of her rights and mistaken as to her remedy.

"11. Because he erred in not holding that the minor defendants were not estopped by the acts of Louisa Johnson."

As we understand it, this is an action for the recovery of real estate upon title claimed to arise out of a sale made under a power contained in a mortgage; but if it should be found that said sale was irregular, and the title thereby acquired defective, then incidentally to cure the defect and validate the title. It is familiar doctrine that in an action for the recovery of the possession of real estate, the plaintiff must recover upon the strength of his own title, considered with reference to the time the action was brought. If the title was then perfect, no confirmation is necessary; but if it was then imperfect, we do not clearly see how the court can, by subsequent proceedings, so validate it as to affect retrospectively the right existing when the suit was brought. See *Moon v. Johnson*, 14 S. C., 434.

It has always seemed to us somewhat anomalous doctrine, that a mortgagor of real estate may include in the mortgage a power to the creditor himself to sell the mortgaged premises without any order of foreclosure in a regular proceeding, such power being entirely *ex parte*, and carrying, as claimed, not only the right to ascertain the amount due on the mortgage debt, but to judge of the necessity for a sale, its time, place, terms, &c., and to execute title to the premises so sold. This anomaly is more striking in those States, as in South Carolina, where it is expressly provided by statute that a mortgage of real estate is a mere security, and even after condition broken, the legal title remains in the mortgagor or his heirs. We incline to think that experience in the administration of the law has shown that this effort by a summary proceeding to avoid litigation and expense, has really increased both, and demonstrated the wisdom of Lord

Eldon, when he said: "How can it be right that such a clause shall be inserted in a deed under which a party is trustee for himself? \* \* \* Here, too, it must be recollected that this is a clause to be acted upon—not by a middle person, who is to do his duty between the *cestuis que trust*—but the mortgagee is himself made trustee to do all these acts." The same learned chancellor, however, said at the same time: "But it is too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, this court is, for that reason, to impeach the transaction," &c.

While, however, the court will not now set aside a power authorizing the creditor, who is the interested party, to sell lands mortgaged, for the reason that it is the contract of the parties themselves, yet all the authorities agree that "as such power may be so easily used for purposes of oppression, the courts should scrutinize sales made under them very closely." *Robinson v. Amateur Association*, 14 S. C., 148. From the view the court takes, it will not be necessary in this case to consider whether the power of sale went with the mortgage to the assignee, Margaret Johnson, nor whether the mode of conducting the sale should have been conformed, as far as possible, to that of ordinary judicial sales, nor whether the vendor, Margaret Johnson, when Pitts failed to comply with the terms of sale, had the right to substitute for him as the last bidder Simpson, and without any consideration paid, to accept from him a conveyance for the premises sold. This circuitry of conveyance was manifestly designed as the means of carrying back the title to Margaret Johnson, the vendor, and must be considered as substantially the same as if Margaret Johnson, the assignee and vendor, had bid off the property at her own sale, and then in her own name conveyed it directly to herself.

The main question is, whether after the death of the mortgagor, Joshua M. Johnson, leaving his widow and children in possession of the premises, the mortgaged premises could be sold and conveyed by Margaret Johnson in her own name, without any reference whatever to the death of the mortgagor or his heirs at law, some of whom were infants. This must, to a large extent, depend upon the determination as to whose the legal

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estate was at the time of the death of the mortgagor. There cannot be the slightest doubt that, at the time of the death of the mortgagor (so far as the mortgage itself was concerned), the title was in the mortgagor, and at his death descended to his heirs. It is true that, according to the common law, a mortgage was a "conveyance of an estate by way of pledge for the security of a debt, and to become void upon the payment of it." But it is quite as clear that in our State, by the act of 1791 (now embodied in section 2299 of the General Statutes), the legal title, upon the execution of a mortgage, remains in the mortgagor, and "the mortgagee shall not be entitled to maintain any possessory action for the real estate mortgaged even after the time allotted for the payment of the money secured; but the mortgagor shall be deemed owner of the land, and the mortgagee as owner of the money lent or due; and shall be entitled to recover satisfaction for the same out of the land by foreclosure and sale according to law." See *Simons v. Bryce*, 10 S. C., 368; and *Warren v. Raymond*, 17 S. C., 163.

It is, however, contended that the power of sale clause in the mortgage had the effect of conveying the legal title away from the mortgagor and his heirs. We confess we cannot so see it. The important words are: "And the said Joshua M. Johnson doth hereby empower and authorize the said John H. Neighbors, &c., to grant, bargain, sell, release, and convey the said premises, &c., at public auction or vendue; at which sale they or any of them shall have the right to become purchasers of the said premises, and on such sale to make and execute to the purchaser or purchasers a conveyance in fee of the said premises, free and discharged from all equity of redemption," &c. We see here no terms of transfer, conveyance, or assignment, but the words "*empower and authorize*" are those appropriate in a power of attorney, as to which the attorney acts in the name and for the benefit of the principal creating the power. It seems that there is such a thing as a trust deed of land as a security, providing that the land shall be sold by the trustee and the proceeds applied to the debt. But, as we understand it, such deeds differ essentially from a mere power of sale; they do in terms carry the legal title of the property to the trustee to be sold and applied by him as a personal trust and

confidence, which cannot be delegated except as provided by the person who created the trust. See 2 *Jones Mort.*, § 1788.

As we have seen that the clause in question did not transfer the title which remained in the mortgagor, but only gave a power of sale, that power assuredly could only be executed in the name of the principal. *Webster v. Brown*, 2 S. C., 429; *De Walt v. Kinard*, 19 *Id.*, 292. It is said, however, that Margaret Johnson did not execute the deed in the name of the principal, Joshua M. Johnson, for the very good reason that at the time of the sale he was dead, and most of his heirs, to whom the title had descended, were infants and incapable of conveying the title.

This fact suggests another difficulty in the way of the plaintiff's recovery on her own title. We think that the power of sale given by Joshua M. Johnson was revoked by his death; and if so, of course, it was incapable of execution. The power of one man to act for another must depend on the will of that other, and when it is withdrawn the power ceases. As the power of sale in this case formed a part of a contract for consideration, it may be conceded that it could not have been revoked in the lifetime of the creator of it; but, nevertheless, we think it was revoked by his death. It certainly was, unless it belonged to that exceptional class where the "power is coupled with an interest." *Hunt v. Rousmanier's Adm'n'rs*, 8 *Wheat.*, 205; *Lockett v. Hill*, 1 *Woods*, 558, and cases there cited. Was the power here, in the sense of the rule, "coupled with an interest"?

I freely confess that the phrase, "a power coupled with an interest," never seemed to me to convey a very clear and definite idea. I am content to adopt the views of Chief Justice Marshall upon the subject, as expressed in the case from Wheaton above cited, where he says: "What is meant by the expression, 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the 'interest' which protects a power after the death of the person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. If we are to understand by the word 'interest' an interest in that which is to be produced by the execution

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of the power, then they are never united; the power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this subject is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name—must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it," &c.

We are aware that Mr. Jones (2 Mortgages, section 1794) has expressed the opinion that "the rule is the same in those States where, by statute or adjudication, a mortgage is regarded as a mere security for debt, passing no title or estate to the mortgagee; the power of sale is coupled with an interest, and is irrevocable, just the same as it is where the common law doctrine, that the mortgage conveys the legal estate, still prevails"—and cites as authority for the proposition the case of *Calloway v. People's Bank of Bellefontaine*, 54 Ga., 441. But as the learned author in the same book repeatedly declares that the deed of sale under the power should be made by the holder of the legal title, we must suppose that he failed to note clearly the great difference as to title between a common law mortgage and one executed under a statute such as that in this State.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the cause remanded to the Circuit, with leave to the plaintiff to move to amend her complaint so as to pray for a regular judicial foreclosure of her mortgage.

Upon this opinion the Chief Justice and Mr. Justice McIver made the following endorsement:

We concur in so much of this judgment as reverses the judgment of the Circuit Court; but we do not concur in so much of



the judgment as allows the plaintiff leave to amend, for the reason that, in our opinion, such an amendment as that contemplated would change substantially the claim of the plaintiff and cannot be allowed under section 194 of the Code.

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LOWRY v. JACKSON.

1. Where plaintiff has improperly made too many parties defendant to his action, a demurrer for defect of parties will not lie. This is good ground of demurrer only when there are too few parties, not when there are too many.
2. In action under the code against heirs-at-law to subject real estate descended to the payment of the ancestor's debt, the administrator of the ancestor is a proper party defendant. If the administrator be not joined, the heirs, it would seem, might require his presence to have an accounting of the personalty, which is primarily liable for the payment of debts.
3. In such an action the complaint need not allege any agreement, obligation, &c., by the heirs to pay the debt, for their liability is only the obligation imposed upon them by law to discharge the debts of their ancestor to the extent of the real estate which has descended to them charged with the payment of his debts.
4. A joint demurrer, not good as to all who take it, must fail even though it would have been good as to one of them if interposed by him alone.
5. Where an action against a married woman does not concern her separate property, her husband is a necessary party; where it does concern her separate property, he is a proper party.
6. On overruling a demurrer to a complaint, the judge may, in his discretion, require the payment by defendant of all costs to date, as a condition precedent to leave to answer.

Before WALLACE, J., Chesterfield, February, 1887.

This action was commenced in December, 1879. The opinion states the case.

*Messrs. Prince & Rankin*, for appellants.

*Messrs. Hough & Kennedy*, contra.

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October 6, 1887. The opinion of the court was delivered by  
MR. JUSTICE McIVER. Inasmuch as the questions presented by this appeal arise under a demurrer, a brief statement of the pleadings becomes necessary. The allegations of the complaint are substantially as follows: 1st. That said Alexander May made his note under seal to said Alfred M. Lowry, dated 29th of December, 1859, and payable one day after date, for the sum of forty-eight 91-100 dollars. 2nd. That Alexander May died intestate sometime in the year 1860, seized and possessed of certain real estate, and that letters of administration upon his estate were duly committed to the defendant, Jackson. 3rd. That there was a judgment for a large sum of money against said Alexander May, remaining unpaid at the time of his death, and that, owing to the destruction of the records in March, 1865, it has long since been impossible to ascertain what amount of assets went into the hands of said Jackson, as administrator as aforesaid, although in response to repeated demands, made by said Alfred M. Lowry in his life-time, upon said Jackson for payment of said note, the said Jackson always declared that the aforesaid judgment was more than sufficient to exhaust all the personal assets of the estate of said Alexander May. 4th. That judgments for large amounts have been recovered against said Jackson individually, which are still unpaid, and his property liable to execution is wholly insufficient for the payment thereof, and that the said Jackson is believed to be wholly insolvent. 5th. That said Alexander May left surviving him, as his heirs at law, his widow Susannah, and his two children, Peter and the defendant, Mary, who has since intermarried with the defendant, David T. Redfearn. 6th. That sometime in the year 1861, the said Peter May died intestate, leaving as his sole heirs at law, his mother, Susannah, and his sister, the defendant, Mary, and that the said Susannah died intestate in 1875, leaving as her sole heir at law the defendant, Mary, and administration of her personal estate has been duly committed to the defendant, Mulloy. 7th. That the land of which the said Alexander May died seized consisted of two tracts—one in the State of North Carolina, and the other in South Carolina, Chesterfield County, of which a particular description is given, and that the South Carolina tract largely

exceeds in value the amount now due on the said note, and that there never has been any partition of the same. 8th. That after the death of said Alexander May his above named heirs at law held and occupied the said land as tenants in common until the death of Peter, when the same was held in common by the said Susannah and the defendant, Mary, with her husband, until the death of said Susannah, since which time it has been in the possession of the defendants, Mary Redfearn and David T. Redfearn. 9th. That Alfred M. Lowry died intestate in 1877, and administration of his personal estate has been duly committed to the plaintiff. 10th. That no part of the said note has been paid. 11th. That the judgment obtained against Alexander May in his life-time, hereinbefore mentioned, has been paid by lapse of time, if not otherwise, and, so far as known to plaintiff, there is now no other debt due by the estate of Alexander May remaining unpaid, except the note hereinbefore mentioned. Wherefore the plaintiff demanded judgment against the said Mary H. Redfearn and her husband, David T. Redfearn, for the amount due on said note, on account of the real estate descended to the said Mary and now in the possession of herself and husband. 2nd. That said tract of land be sold and the proceeds thereof be applied to such judgment, and the costs of these proceedings. 3rd. For general relief.

To this complaint the defendants, Jackson, as administrator as aforesaid, and Redfearn and wife, filed a joint demurrer, upon the following grounds: 1st. Because there is a defect of parties defendant, in that Redfearn and wife are in no way liable on the note sued upon. 2nd. That "several causes of action have been improperly united, in that plaintiff brings her action to recover against the defendant, Stephen Jackson, as administrator, on a note alleged to have been executed to her intestate by the intestate of said Jackson, and in the same action seeks to recover against the defendants, Mary H. Redfearn and David T. Redfearn, the amount of the said note, on the ground that they are in possession of lands of the estate of the intestate of said Jackson—the last cause of action being one which does not arise out of the same transaction as that against the defendant, Jackson, as administrator as aforesaid, nor out of transactions connected

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with the same subject of action, and being none of those which by law may be united in the same complaint therewith." 3rd. Because "the complaint does not state facts sufficient to constitute a cause of action against these defendants, Mary H. Redfearn and David T. Redfearn, in that there is no allegation of any promise, undertaking, contract, agreement, obligation, or liability, express or implied, in law or in equity, to pay the amount of the note sued upon."

The Circuit Judge overruled the demurrer, with leave to the defendants to answer within twenty days upon the payment of the costs which had accrued up to that time, and the defendants appealed substantially upon the grounds set out in the demurrer, as well as upon the additional grounds, that David T. Redfearn was in no view of the case a proper party, and that the judge erred in attaching, as a condition precedent of the leave to answer, the requirement that defendants should pay the costs.

It is clear that the first ground of demurrer—for *defect* of parties defendant—cannot be sustained, even if it be conceded that the two Redfearns were not proper parties. *Defect* of parties, as the word imports, means too *few* and not too *many*. Hence, as is said in Pomeroy on Remedies, section 206: "A demurrer alleging this particular objection can only be interposed, therefore, in case of a *non-joinder* of necessary parties plaintiffs or defendants, and never in case of a *mis-joinder*. The word 'defect' is taken in its literal sense of 'deficiency,' and not in a broader sense as meaning *any* error in the selection of parties. Upon this point the courts are nearly unanimous." In fact, as it appears from the note (3) to section 287, this construction is now universal, as the case in Wisconsin which held the contrary has since been overruled, and the court in that State is now in harmony with all the other States.

As to the second ground of demurrer, it seems to us to be based upon a misconception of the complaint. For it does not there appear that the plaintiff claims to have any cause of action against Jackson as administrator, nor is any judgment against him demanded. It is true that some of the facts stated in the complaint would constitute a cause of action against the administrator, but it is manifest that those facts are stated, not for the

purpose of furnishing a basis for a cause of action against the administrator, but for the purpose of showing that the plaintiff has a cause of action against Mary H. Redfearn and David T. Redfearn, by reason of the fact that the land of the deceased debtor has descended to the said Mary as his heir, and that she, with her husband, is now in possession of the same; and the fact that there may be allegations in the complaint not necessary to support such a cause of action, does not render it amenable to the objection that two causes of action have been improperly united. So that the real ground of objection is that Jackson as administrator has been improperly made a party to a case in which a cause of action against the Redfearns is sought to be enforced. Now, even if it should be conceded that the administrator was improperly made a party, that would not afford a ground for demurrer, as we have seen in considering the first ground, for that would be an objection on account of *excess* and not for *defect* of parties; and as the only question presented by the appeal is, whether the demurrer was properly overruled, this view would be sufficient to dispose of it.

But we do not desire to be regarded as conceding that the administrator was not a proper party. It is true that, under the former system of pleading, the administrator was not a proper party to an *action at law* against the heir, for the debt of the ancestor, on account of real estate descended; but it was otherwise in a *proceeding in equity*, where the administrator was not only a proper, but a necessary party. *Story Eq. Pl.*, §§ 173, 176, 180; *Vernon v. Valk*, 2 *Hill Ch.*, 257; *Goodhue v. Barnwell*, *Rice Ch.*, 239, recognized in *Mobley v. Cureton*, 2 *S. C.*, 148. Now since the code has substituted a totally different system of pleading, and abolished the distinction between actions at law and proceedings in equity, whereby a defendant may plead equitable as well as legal defences to the same action, we do not see why the administrator may not be regarded at least as a proper party to an action against the heir, for the debt of the ancestor, on account of real estate descended; or why the heir, when sued alone in such an action, may not require that the administrator shall be made a party (*Cleveland v. Mills*, 9 *S. C.*, 436), in order to prevent circuitry of action by furnishing the heir with

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an opportunity of requiring from the administrator, if he desires it, an account of the assets primarily appropriated to the payment of debts.

The third ground of demurrer cannot be sustained. In an action against the heir for the debt of the ancestor, on account of real estate descended, there is no necessity for any "allegation of any promise, undertaking, contract, agreement, obligation, or liability, express or implied," on the part of the heir to pay the debt. The obligation to do so does not arise from any promise or undertaking either express or implied on the part of the heir to pay the debt, but upon the ground that he is in possession, as heir, of certain property liable for the payment of the debt. This conclusively appears from the fact that his liability only extends to the value of the property descended, even though it may be much less than *the amount of the debt*; whereas if his liability arose from any promise or undertaking to *pay the debt*, it would extend to the whole amount of the debt, regardless of the value of the property which he took by descent. As to the absence of any allegation of any "obligation or liability" on the part of the Redfearns to pay the debt, it is obvious that such an allegation would be a mere legal conclusion from the facts stated, and, therefore, not only unnecessary, but improper, as the well settled rule is that *facts*, and not *legal conclusions*, must be stated in pleadings under the code.

As to the ground taken by appellant that the demurrer should have been sustained as to David T. Redfearn because he was in no view of the case a proper party, it would be sufficient to say that the demurrer being joint, it must fail as to all, even though it might be good if interposed by one, unless it can be sustained as to all who join in the demurrer. *Pomeroy on Remedies*, section 291. But in addition to this, it seems from section 135 of the Code that David T. Redfearn was a proper party. That section provides: "When a married woman is a party, her husband must be joined with her, except that, when the action concerns her separate property, she may sue or be sued alone," though neither the husband nor his property can be made liable for any recovery against her in such a suit. Now, conceding that the action here does concern the separate property of the

wife, though that fact is not stated in the complaint, it does not follow that the husband was an improper party, for the language of the statute, when laying down the general rule, is imperative—"must be joined," but in stating the exceptions it is merely permissive—"may sue or be sued alone," which, of course, implies that the husband may be joined with her even in actions concerning her separate property.

The only remaining inquiry is whether there was any error on the part of the Circuit Judge in requiring as a condition precedent, for the leave to answer over, the payment of the costs accrued up to that time. Section 193 of the Code provides: "After the decision of a demurrer, the court shall, unless it appear that the demurrer was interposed in bad faith, or for purposes of delay, allow the party to plead over upon such terms as may be just." Who shall determine what terms are just, the statute does not declare; but inasmuch as that is a question of fact, it would seem to be determinable alone by the Circuit Judge, as a matter addressed to his discretion; and such has been the view heretofore taken by this court in *Railroad Company v. White*, 14 S. C., 52, where the point now raised was decided adversely to the view contended for by appellant, and the same principle was subsequently acted upon in the case of *Cureton v. Stokes*, 20 S. C., 582, and in a case between the same parties in 22 S. C., 583.

The judgment of this court is, that the order overruling the demurrer be affirmed, with leave to the defendants to answer within twenty days after written notice to their attorneys of this decision, upon payment of the costs, which had accrued up to the date of said order, to be taxed by the clerk of the Court of Common Pleas for Chesterfield County.

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MOSES v. HATFIELD.

1. Parol testimony is competent to apply a written contract to a proper subject-matter, and therefore it was admissible in this case to show that a mortgage, purporting to secure a note for a specified sum of money, was really given to secure future advances.

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2. There was no error in refusing to require the assignee of this mortgage to produce the note, when the complaint alleged that no note had ever been given, and the defence made no allegation that such a note had ever existed—particularly where its description in the mortgage did not show that it was negotiable.
3. Where the assignee of a mortgage given to a partnership, files his complaint for foreclosure, in which he alleges that the defendant executed his mortgage to M. & Co., and sets out the mortgage which recites the partnership of M. & Co., the allegation of partnership was sufficient; but if deficient in form, might be cured by amendment.
4. One member of a partnership firm may assign a mortgage by signing the firm-name to the assignment; and so, too, he may assign the evidence of debt secured by the mortgage, and such an assignment would carry with it the mortgage.

Before WALLACE, J., Sumter, October, 1886.

This was an action by Altamont Moses, assignee of F. H. McEachern & Co., against M. B. Hatfield, for the foreclosure of a mortgage. The opinion states the case.

*Messrs. Jos. H. Earle, Attorney General, and Robert O. Purdy, for appellant.*

*Messrs. Moises & Lee, contra.*

October 6, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. The object of this action is to foreclose a mortgage of real estate. In the complaint it is alleged that the mortgage was given by defendant to F. H. McEachern & Co., nominally to secure the payment of a certain note described in the mortgage, but really to secure the payment of advances to be made by the mortgagees to the defendant for the purpose of enabling him to carry on his farm for the year 1885: that the note mentioned was never given, but advances were made, and there remained due thereon an amount less than the amount specified in the note for which judgment was claimed. It was also alleged that said McEachern & Co. had, for value, assigned to the plaintiff, before the commencement of this action, the said mortgage, together with the account for advances to the plaintiff. The defendant by his answer set up three defences:



First. "That he denies each and every allegation of said complaint, except such as may be hereinafter expressly admitted." Second. "That the debt intended to be secured by said mortgage has been discharged by payment." Third. Tender of the balance claimed to be due by the plaintiff and refusal thereof.

F. H. McEachern, one of the original mortgagees, testified in substance as follows: that when applied to by defendant for advances, he agreed to make such advances, provided the same was secured by a mortgage on his real estate, and also a lien on his crop and a mortgage on his personal property; that this was done by defendant, the said witness stating to the defendant at the time the papers were executed, "that his real estate must stand good for any advances made to him, and the lien on his crop and the mortgage of personal property must be a secondary consideration"; that this was agreed to by defendant; that the advances were made, and that the balance due thereon was the amount stated in the complaint, and that such balance, together with the mortgage, had been assigned to the plaintiff. On his cross-examination, this witness testified that the lien on the crop and the mortgage on the personal property had been assigned to Trumbo, Hinson & Co.; that the horse mortgaged was dead, and that the four bales of cotton delivered under the lien "were worth about forty dollars less than the expenses of picking, ginning, bagging, and ties, which the witness paid for," as well as twenty-five dollars rent due by defendant. This witness, after examining his books, which were offered in evidence, testified that all proper credits had been given, leaving the balance due as stated in the complaint. The book-keeper of McEachern & Co., who was one of the subscribing witnesses to the mortgage, proved its execution, as well as the balance due on the account for advances, and the mortgage was put in evidence. The counsel for defendant at the proper time (the testimony having been taken by the master) objected to all parol testimony as to what passed between the parties at the time and before the mortgage was executed, upon the ground that the papers must speak for themselves.

At the close of plaintiff's testimony counsel for defendant moved that the complaint be dismissed upon the following grounds: 1st. Because the testimony by parol above stated was

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improperly admitted. 2d. That the note referred to in the mortgage was not produced, and its absence not accounted for. 3d. That there was no evidence that the note had been assigned to plaintiff. 4th. That the assignment of the mortgage alone was wholly nugatory and passed no rights to the plaintiff. 5th. That there was no evidence that the mortgagees ever assigned the mortgage to the plaintiff. The motion was overruled, and no testimony on the part of the defendant having been introduced, judgment of foreclosure and sale was rendered, as prayed for in the complaint. From this judgment defendant appeals upon the grounds, substantially, taken in support of the motion to dismiss the complaint, and upon the further ground that there was neither allegation nor proof as to who composed the firm of F. H. McEachern & Co.

It will be observed that the rights of third persons are not involved in the present inquiry, but only those of the mortgagor and the plaintiff as assignee of the mortgage. Trumbo, Hinson & Co. are not parties, and their rights, if they have any, under the assignment of the lien and mortgage of personal property are in no way involved in the present controversy, and cannot be affected by any decree herein. It may be that their claims have been fully satisfied, and if so, to allow any possible rights they may have acquired to be used for the protection of the defendant, would result in enabling the defendant to evade the payment of what seems to be a just debt. If, however, they have not been satisfied, and the defendant had any just reason to fear that he might also be liable to them, his course was plain to protect himself by demanding that they should be made parties, which he has not seen fit to do. Indeed, it does not appear that any account or other evidence of debt against the defendant has been assigned to Trumbo, Hinson & Co., but simply the agricultural lien and the mortgage on the personal property, whereas it does appear in this case that not only the mortgage here brought in question, but also the debt which it is alleged it was given to secure, has been assigned to the plaintiff. But be that as it may, the rights of Trumbo, Hinson & Co. are not now involved, and any rights they may possibly have once acquired cannot be used by the defendant to shield himself from the payment of a just

debt without a proper showing by pleading and evidence on the part of the defendant, which has not been made.

It will also be observed that no testimony whatever has been adduced in support of the second and third defences set up in the answer, and they may, therefore, be dismissed from further consideration. The real controversy is that raised by the first defence, and that turns upon the inquiry whether the plaintiff has adduced sufficient competent testimony to make out his case.

First, it is contended that the court erred in receiving parol testimony to show what debt the mortgage was really intended to secure. Now, while it is quite true that a written contract cannot be contradicted or varied by parol evidence, yet such evidence is competent to apply a written contract to its proper subject matter, as, for example, in case of a mortgage to the debt really intended to be secured thereby. 1 *Jones Mort.*, § 351. As is said in section 346 of the same volume: "Although a mortgage be given for a definite sum, it is competent to prove by parol that it was given to secure an open account, the balance of which is continually varying." So in section 353: "A deed of trust or mortgage is valid without any note or bond, although it purports to secure a note or bond, and substantially describes it. The mortgage debt exists independently of the note. The inquiry is, does the debt exist? \* \* \* The validity of a mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by bond, note, or otherwise; it depends rather upon the debt it is given to secure." So in section 374: "It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt to that amount." And in section 376: "Although the deed purports to be in consideration of a definite sum in hand paid at the time, it may be shown by parol evidence that the deed was made to secure advances made and to be made to that extent." And in section 384: "Parol evidence is admissible to show the true character of a mortgage, and for what purpose and what consideration it was given. Although it be for a definite sum and secures the payment of notes for definite amounts, it may be shown that the mortgage was simply one

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of indemnity." These doctrines have been recognized and acted upon by this court in several cases. See *McCaughrin & Co. v. Williams*, 15 S. C., 505; *Kaphan v. Ryan*, 16 Id., 352; *Walker v. Walker*, 17 Id., 329; *Moffatt v. Hardin*, 22 Id., 9; and *Dial v. Gary*, 24 Id., 572. There was no error, therefore, in receiving parol evidence to show that, although the mortgage purported to secure the payment of a note for a specified sum of money, its real object was to secure the payment of advances to be made to an amount not exceeding the sum specified.

Nor do we think there was any error in rendering judgment without requiring the production of the note mentioned in the mortgage, or some evidence to account for its non-production. In the complaint it was alleged that no note had ever been given, and the evidence having shown the true form of the indebtedness which the mortgage was really intended to secure, no such evidence as that demanded could possibly have been given, and if the defendant really claimed that a note had been given, which might afterwards be brought up against him, it was for him to show that fact by way of defence, especially as it does not appear that the terms of the alleged note as specified in the mortgage were such as to render it negotiable. If, as we have seen by the authorities above cited, a mortgage may be valid without a note or bond, although it purports to secure a note or bond and substantially describes it, surely the failure to produce such mythical note, or account for its non-production, where, as in this case, the allegation is, that no note was in fact given, but that the mortgage was really intended to secure advances, cannot be fatal to the plaintiff's case, in the absence of any evidence tending to show that a note was given. It follows from what has been said that there was no error in failing to require proof that the note described in the mortgage had been assigned to the plaintiff.

Inasmuch as the testimony did show that *the debt* really intended to be secured by the mortgage—the account for advances—was assigned to the plaintiff, it is unnecessary to consider what effect the assignment of a mortgage simply, without any assignment of the debt which it was given to secure, would have.

Finally, it is contended that there was no allegation or proof as to who composed the firm of F. H. McEachern & Co., and no proof that such partnership ever assigned the mortgage to the plaintiff. First, as to the allegation and proof of the partnership. It is true that there is in the complaint no distinct and formal allegation that Furman H. McEachern and James R. McEachern constituted the firm of F. H. McEachern & Co., but it is alleged that the defendant "executed and delivered to the said F. H. McEachern & Co. his deed, and thereby conveyed by way of mortgage to the said F. H. and J. R. McEachern, their heirs and assigns, the following lands," &c., and the mortgage there referred to, contains a recital that Furman H. McEachern and James R. McEachern were co-partners, trading under the firm name of F. H. McEachern & Co. This, it seems to us, was substantially sufficient. It was certainly sufficient *proof*, being the written admission of the defendant, of the fact of partnership, and even if the *allegation* should be regarded as deficient in form, such deficiency may be supplied by amendment under the liberal provisions of the code.

Next, as to the objection that there was no proof that the assignment of the mortgage was executed by the *partnership*. This objection rests upon the fact that F. H. McEachern testified: "*I have assigned the account and mortgage to secure it to the plaintiff,*" and it is argued that this shows that the assignment was executed by him in his *individual* name, and not in the name of the partnership. We do not see that this is a necessary or even legitimate inference from the testimony. The material fact stated by the witness is that the mortgage was assigned to the plaintiff, and if that fact be true, then the inference would be that the assignment was signed in the partnership name, as that would be the proper mode of doing that act. The fact that one of the partners actually wrote the name of the partnership, while it might justify the statement—"I have assigned the mortgage"—would not warrant the conclusion that the act done was only the act of the individual, and not that of the partnership. A mortgage not being a conveyance, but simply a security for the payment of a debt, we see no reason why it may not be assigned just as any other chose in action due to a partnership

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should be—by the signature of the partnership name placed there by either of the partners. Indeed, as the assignment of a note or other evidence of debt, secured by a mortgage, carries with it the mortgage, and as such assignment can unquestionably be made by either one of the partners, it does not matter, in this case, whether the assignment of the mortgage was properly made or not; for if the account, representing the debt secured by the mortgage, was assigned, as the testimony shows, that would carry the mortgage with it.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

## TURBEVILLE v. FLOWERS.

1. In the partition of an intestate's lands one tract was assigned by the commissioners to the widow. All parties agreed that this assignment should be disregarded and this tract sold along with two others, and it was purchased by the second husband of this widow, it being about her share, he giving his bond for his bid. One of the other purchasers failed to comply and the tract purchased by him was afterwards sold for a less amount. *Held* (the widow consenting that her husband's bond should be credited with her share), that such share was a third of the money realized from the sales, and not a third of the amounts for which the land was first sold.
2. The assets of an intestate's estate cannot properly be distributed amongst the heirs at law and distributees, and their shares therein properly ascertained, until the same are converted into money or what the parties may accept as money.
3. Distributees of an estate are chargeable with interest on their purchases of real and personal property from the date of purchase until payment.
4. An administrator is liable for Confederate money properly received by him where he fails to show that it perished on his hands.
5. An administrator is liable for uncollected notes taken at a sale made by him during the war, where he fails to show that they could not have been collected.
6. A question (other than one of jurisdiction) not presented to or passed upon by the Circuit Court, cannot be considered here.

Before COTHRAN, J., Marion, October, 1886.

This was an action by Willis Turbeville and wife against the other distributees of Richard Brown, deceased, to which action C. D. Evans, administrator, was afterwards made a party plaintiff. The opinion sufficiently states the case.

*Messrs. C. D. Evans and Jos. T. Walsh, for appellants.*

*Mr. W. J. Montgomery, contra.*

October 6, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. On or about January 1, 1864, Richard Brown departed this life intestate, leaving as his heirs at law his widow, Mary, who has since intermarried with the plaintiff, Willis Turbeville, and a number of children and grandchildren, whose names may be found in the record. The intestate at the time of his death was seized and possessed of three tracts of land and some personal property, administration of which was duly committed to C. D. Evans, Esq., then commissioner in equity, as a derelict estate, under the provisions of the act of 1857. In the fall of the year 1864, the administrator made sale of the personal property, which was bought principally by some of the distributees, though some of them bought nothing at the sales of the personalty.

On January 4, 1867, a bill in equity was filed by the plaintiffs, calling upon the administrator to account and asking for partition of the real estate. Accordingly an order was granted that a writ of partition do issue and that the administrator do account. The commissioners made their return, recommending that one of the tracts of land be set apart to the widow of the intestate, then the wife of plaintiff, Turbeville, and that the other two tracts be sold for distribution. Some dissatisfaction having arisen amongst the other heirs at law at this arrangement, Willis Turbeville and wife, on December 2, 1867, executed a paper, a copy of which is set out in the record, whereby they formally waived the assignment of one of the tracts of land to Mary Turbeville as her portion, and consented that all three of the tracts should be sold on the terms recommended by the commissioners in partition, and on December 11, 1867, an order was granted by the Court

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of Equity, upon the motion of the attorneys for the plaintiffs, confirming the return of the commissioners, except so much thereof as assigned one of the tracts of land to the plaintiff Mary, and directing that all three of the tracts be sold on the terms specified.

In pursuance of this order the three tracts of land were offered for sale on the first Monday in January, 1868, when tract marked A was bid off by A. H. Ford, tract B by Robert Collins, and tract C by the plaintiff, Willis Turbeville. Ford complied with the terms of sale, and has paid his bond for the purchase money in full. The bond of Turbeville still remains unpaid as part of the assets of the estate of Richard Brown for distribution. Collins, the other purchaser, though he never complied with the terms of sale, and never paid any part of the purchase money, except three bales of cotton delivered to the administrator (when, does not appear), went into possession, and he and those to whom he sold continued to occupy the tract of land, until a resale was made in 1879—eleven years after the first sale—at which resale one Thomas Collins became the purchaser, complied with the terms of sale, and paid the purchase money to the master. No further step appears to have been taken in the case until March 28, 1873, when an order was granted by the court, on the motion of the attorney for plaintiffs, for the distribution of the funds in the hands of the clerk of the Court of Common Pleas amongst several of the heirs named in the record, but not including the plaintiff Mary. After this the case rested until October 12, 1883, when, on motion of the attorneys for plaintiffs, and with the consent of W. J. Montgomery, Esq., who had in the meantime been employed to represent certain of the heirs of Richard Brown, and with the consent of C. D. Evans, Esq., administrator, an order was granted reviving the action, giving leave to amend the complaint, bringing in certain infant distributees as parties, and allowing the administrator to account.

On April 30, 1886, another order was passed referring all the issues of law and fact to J. D. McLucas, Esq., as special master, with leave to report any special matter. In pursuance of this order the special master made his report, in which, after stating the facts hereinbefore substantially set forth, together with other



matters which do not now appear to be in dispute, accompanied with statements of the accounts of the several parties, including that of the administrator, showing the balances due to and by them respectively, recommends the adoption of the same by the court. To this report exceptions were filed by the plaintiffs, as well as by Mr. Evans, as administrator.

The Circuit Judge overruled all the exceptions and rendered judgment confirming the report, and from this judgment the same parties appeal upon the following grounds: "1. That the plaintiff, Mary Turbeville, *née* Mary Brown, her husband, Willis Turbeville, joining her, having waived her right, her husband joining her, to the assignment of the tract to her made by the commissioners in partition as the widow of Richard Brown, and consenting to a sale thereof by the commissioner in equity, A. D. 1866, the said Mary Turbeville was entitled, as of the day of sale, of all the real estate of Richard Brown, to wit, the 2nd of January, 1868, to her distributive portion, one-third of the proceeds of the sale of the three tracts of land; and also having assignments of John Brown and Brown, heirs at law of Richard Brown, which aggregate a sum of money exceeding the amount of the bond conditioned for the payment of eleven hundred and fifty-six dollars, she is entitled to have the bond delivered up to be cancelled; and the balance due them on assignment to be paid them of the fund in hand; and that the cumulation of interest as reported by the master is unjust and inequitable."

The exceptions of Mr. Evans, as administrator, are as follows: "1. That he is charged with two hundred and fifty-nine 12-100 dollars, cash received in Confederate currency, which perished in his hands. 2. That he is charged with notes for purchases at sale, viz., W. W. Durant, \$196; J. A. Parham, \$210; A. Robbins, \$186, = \$592; aggregating five hundred and ninety-two dollars, which, on account of the disordered state of the times in 1865, and the absence of courts, could not be collected; and on the expiration of his term of office in 1865 were turned over to his successor in office. 3. That he is charged with seventy-five dollars as money received for the estate of Richard Brown, when in fact the said money was for taxed costs in the foreclosure of

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mortgage against Robert Collins, a purchaser of one of the tracts of land of estate Richard Brown, and which charge against C. D. Evans, as administrator, is unsustained by a particle of testimony."

The special master in his report calculates interest on the amount of the purchases made by the several heirs at the sale of the personalty, as well as interest on the amounts heretofore paid to some of the heirs up to June 30, 1886—the day to which the report was made up—as well as interest on the bond of Turbeville to the same date, and after eliminating therefrom the amounts which had been thus received by three of the children and two of the grandchildren, who appear to have been overpaid, he adds up the several sums thus obtained, together with the cash in the hands of the master, arising from sales of the real estate, and regards the amount thus arrived at as representing the total assets of the estate now remaining for distribution, of which sum the widow, Mary Turbeville, would have been entitled to one-third, and the remaining two-thirds would have been divisible amongst the other heirs, who had not been overpaid, in the proportions to which they were severally entitled, but the widow having received, by her purchases at the sale of the personalty as well as the real estate, more than her third, she becomes indebted in the amount stated in the report, and as most of the other heirs have also received portions of their shares by purchases at the sale of the personalty or by cash heretofore paid them by the clerk or by the master, they are now only entitled to receive the several balances set forth in the report, while the one who has heretofore received nothing from either of these sources is now entitled to his full share as thus ascertained and set down in the report. Why the amounts overpaid to some of the heirs should have thus been eliminated, does not appear, and by what authority the share of the widow was set off against the amount of her husband's bond given for the real estate, has not been made to appear. But as no controversy seems to have been raised, either in the court below or here, as to either of these matters, these questions are not before us and will not be considered, but we will confine our attention to the questions raised by the exceptions or grounds of appeal.

The gravamen of the complaint on the part of Turbeville and wife seems to be that there was error in the time resorted to for the purpose of ascertaining the amount of the widow's share, they claiming that the same should have been ascertained at the time of the sales by setting apart to her one-third of the amount thereof, as a credit on her purchases (as it is termed) at the time of the sales. The fallacy of this claim is manifest from the facts which have occurred in this very case. The amount for which the land was bid off at the first sale was three thousand and thirty-six dollars, but by reason of the failure of one of the bidders to comply with the terms of the sale, a resale of one of the tracts became necessary, which, for some unexplained reason, did not take place until about eleven years afterwards; and at this sale the tract sold for less than the amount bid for it at the first sale, and under the view contended for by appellants, the loss thereby sustained, as well as the loss of the interest thereon for the intervening eleven years, would fall entirely upon the other heirs, who certainly were in no way responsible for the causes producing such a loss. This would be manifestly inequitable, and contrary to the rules and practice of the court in making distribution of an intestate's estate. The assets of such an estate cannot properly be distributed amongst the heirs at law and distributees, and their shares therein properly ascertained, until the same are converted into money, or what the parties may accept as money.

As is said by Harper, Ch., in *Gillett v. Powell, Speer Eq.*, 149-50 (the italics being ours), in speaking of a case where real and personal estate had been sold for a division, at which some of the heirs made purchases, giving their bonds for the amounts of such purchases, under an agreement between some of the parties that the bonds so given were not to be paid, but upon a final settlement of the estate should be cancelled: "I have no doubt but that partition might be made in this way, if the distributees of an estate should purchase to about the amount of their shares, give their bonds for the amount, and then these bonds should be settled, each receiving or paying whatever amount his purchase might exceed or fall short of his share (for it is hardly possible that each should purchase to the exact amount of his share), and the bonds then cancelled. *But until such settlement and cancel-*

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lation, there could be no distribution. Until then they would be liable on their bonds in case of any unexpected debt arising, or for any balance exceeding or falling short of their shares. In contemplation of law it is not the property (of which they are merely purchasers, as any other individuals would be), but the money, secured by the bonds, which is the subject of partition."

Now, if this be true of a case where there was an agreement between some of the parties that partition should be effected in that way, how much more true would it be in a case like the present, where there is no evidence whatever of any such agreement. The case of *Huson v. Wallace* (1 Rich. Eq., 1), relied on by appellants, is in no wise in conflict with this view. There *actual* partition had been made in 1831, and the return was confirmed *nunc pro tunc* in 1835, and the court held that the order confirming the return had relation back to the actual partition, vesting the legal title in the wife from that time, upon which the marital rights of the husband attached, though the wife had died before the date of the order confirming the return.

The bond of Willis Turbeville, given for the purchase money of the tract of land bid off by him, represented a debt due by him to the estate, and as such constituted a part of the assets of the estate, in which all of the heirs were entitled to share, and cannot be regarded as representing his wife's share. Indeed, if the wife had been so minded, she might have declined to allow that bond, or any portion thereof, to be set off against her share of the estate. *Roberts v. Adams*, 2 S. C., 337; *Farrow v. Farrow*, 12 Id., 168; *Kennedy v. Badgett*, 19 Id., 591. But we do not understand that Mrs. Turbeville takes any such position, but, on the contrary, she insists, as she has a right to do, being now, to some extent at least, *sui juris*, that her share of the estate should be set off against the debt due by her husband, only contending that there has been error in ascertaining the amount of her share and crediting the same on the debt at the proper time. The fact that the commissioners in partition recommended that the tract of land, afterwards purchased by her husband, should be assigned to Mrs. Turbeville as her third of the real estate, cannot affect the question. No such assignment was ever made; but, on the contrary, it was expressly waived by both Turbeville and wife,

who, in writing, consented that this tract of land should be sold along with the others, whereby she became entitled only to her share of the proceeds of the sales of the land, and not to the land itself, whenever the same should be realized. The practical effect was the same as if the commissioners in partition had, in their return, recommended a sale of all three of the tracts, for the order of sale which was made, was in effect an amendment of the return to that end, which was made by the consent in writing of both Turbeville and wife, sanctioned by the court.

As to that portion of the exception of these appellants which speaks of assignments from two of the heirs, held by Mrs. Turbeville, we find no foundation for it in the facts stated in the "Case." There is no evidence, so far as there appears, of any such assignments, and hence there is nothing upon which this part of the exception can be founded.

As to the last portion of the exception, which complains of the "cumulation of interest," besides the fact that it is not presented as required by the rules of this court, being too general in its form to require any notice, we see no ground for it even as explained in the argument. The amounts of the purchases at the sales, both of the real and personal estate, constitute debts due to the estate, and, of course, must bear interest until they are paid or otherwise settled; and as they never have been paid or otherwise settled, it was manifestly correct to compute the interest thereon, as has been done by the master. Of course, the widow is entitled to her share of the "cumulation of interest," and this has been allowed her, but the other heirs are alike entitled to their share thereof, and that has been properly allowed them.

Next, as to the exceptions filed by the administrator. It does not appear that he ever made any returns, or that he kept any detailed account of his receipts and disbursements on account of the estate committed to his charge. This latter omission, however, may be accounted for by the testimony of the administrator, that "most of the memoranda and papers of the estate were destroyed" when his office was burned in February, 1870. In this condition of things the special master states that he made up this account from a statement rendered by the administrator, which not being full, he supplemented it by the records and

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vouchers found in the case. We are unable to find any testimony upon which the first and second exceptions of the administrator can be based. It is true, that in the statement rendered by the administrator from memory, he claims to have received the amount mentioned in the first exception in Confederate money, although the terms of the sale required that good money should be paid, yet it does not appear that any portion of it "perished on his hands." On the contrary, it appears from the same statement that a portion of it, at least, was paid out. So that even conceding that the administrator may have been justified in receiving Confederate money, because, as he says in his argument, though the fact does not appear in the testimony, the terms of sale required that all sums of and under twenty dollars should be paid in cash, which necessarily implied Confederate money, yet, as we are unable to find any evidence whatever that the sum claimed, or any other sum, "perished on his hands," but, on the contrary, do find that a portion of the sum received was paid out, we do not see how this exception can be sustained.

So, too, as to the second exception filed by the administrator, there is no testimony to sustain it. Indeed, it does not appear very distinctly that the administrator ever took any such notes as are there mentioned. True, it does appear that the persons named in this exception were purchasers at the sale, but the amounts of their purchases do not, in one instance at least, correspond with the amount of the note, as stated in the exception, but as the other two do correspond, this discrepancy may be owing to a misprint. Assuming that this is so, and that the administrator, as we are disposed to believe, did actually hold such notes, we look in vain for any testimony tending to show that these notes could not have been collected.

As to the third exception, it is sufficient to say that no such exception was taken in the court below, and therefore it cannot be considered here. Our province is to review the action of the Circuit Court, and therefore a question not presented to or passed upon by the Circuit Court, except a question of jurisdiction, we have no authority to determine.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

## STATE OF SOUTH CAROLINA v. FOOT.

1. In action by a judgment creditor to vacate mortgages and an assignment of the judgment debtor for fraud, it is not necessary that the other creditors, in whose behalf as well as his own the action is brought, should have their claims in judgment.
2. The plaintiff might maintain this action notwithstanding his judgment was obtained only as a security for such creditors as might establish claims thereunder, if the judgment was also for a fixed amount of costs immediately enforceable.
3. In such an action it is not necessary that the complaint should state that the plaintiff's execution had been returned *nulla bona*.
4. Where an assignment for the benefit of creditors, executed after judgment obtained against the assigning debtor, disposed of property not covered by the lien of this judgment, or at least difficult to be reached by its execution, the judgment creditor might maintain action to vacate the assignment.
5. In action by a judgment creditor to vacate a mortgage of his debtor, it cannot be held on demurrer that the complaint, in omitting to allege that the mortgage debt would exhaust the mortgaged land, fails to state facts sufficient to constitute a cause of action, where the complaint does allege that it is impossible to collect the judgment unless the mortgage is set aside.
6. A judgment creditor has a cause of action against the assignee of his debtor where the property of the debtor is put by the assignment beyond the reach of the plaintiff's judgment, and is to be primarily applied to fraudulent mortgages.
7. A judgment creditor may bring his single action to vacate mortgages fraudulently executed by his debtor at one time, and an assignment for the benefit of creditors fraudulently and collusively executed by this same debtor at another time. This is but one cause of action—the attempted fraudulent disposition by all the defendants of the debtor's property to defeat the plaintiff's claim.

Before FRASER, J., Newberry, November, 1886.

This was an action by the State of South Carolina, a judgment creditor of Michael Foot, in behalf of itself and all other creditors of said M. Foot, against Michael Foot, B. Oderdorfer, Harry H. Samuels, Otto Klettner, and Mordecai Foot. The opinion states the case.

*Messrs. Moorman & Simkins and Y. J. Pope, for appellants.*

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*Messrs. Geo. S. Mower, Suber & Caldwell, and Jas. Y. Culbreath, contra.*

October 6, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. The plaintiff, a judgment creditor of Michael Foot, suing on behalf of itself and all other creditors of said Foot, who may come in in the proper way and at the proper time, brings this action to set aside certain mortgages made by its judgment debtor to the defendants, Oberdorfer, Samuels, and Klettner, and also an assignment to the defendant, Mordecai Foot, upon the ground of fraud, and to subject the property embraced in such mortgages and assignment to the payment of the just debts of the said Michael Foot. To the complaint each of the defendants demurred upon two grounds: 1st. Because it does not state facts sufficient to constitute a cause of action. 2nd. Because several causes of action are therein improperly united. The Circuit Judge overruled the demurrers, and from his judgment defendants appeal.

The allegations of the complaint, which, for the purposes of this inquiry, must be taken to be true, are substantially as follows:

1st. That the defendant, Michael Foot, together with Henry C. Moses and others, executed their bond to the plaintiff, conditioned for the faithful discharge, by said Moses, of the duties of clerk of the Court of Common Pleas for Newberry County.

2nd. That said Moses failed to perform said duties and in consequence thereof the plaintiff commenced an action on the said bond against said Moses, Michael Foot, and the other sureties, and having obtained a verdict in said action for the sum of ten thousand dollars, judgment was duly entered thereon in the proper office on the 18th day of February, 1885, for the said sum, together with the sum of one hundred and sixty-six 79-100 dollars costs and disbursements in said action.

3rd. That execution was duly issued on said judgment and placed in the hands of the sheriff, who attempted to levy on the personal property of the said Michael Foot, but was resisted by the defendant, Mordecai Foot, who claimed the said property under a deed of assignment, from said Michael to said Mordecai Foot, a copy of which is filed as an exhibit to the complaint.



4th. That in consequence of said facts, the execution remains wholly unpaid in the hands of the sheriff.

5th. That on the 27th of January, 1885, the said Michael Foot executed a mortgage to the defendant, Oberdorfer, on all his real estate in the County of Newberry to secure the payment of an alleged debt of seven thousand five hundred dollars, with interest from the date of said mortgage.

6th. That the said Michael Foot, on the 7th of February, 1885, executed a mortgage to the defendant, Samuels, on "all his goods, wares, and merchandise, his store fixtures, his books of account, notes, bonds, and other choses in action, his two horses, his dray and harness, his double buggy and harness, and also undertook to set over and mortgage to said H. H. Samuels all his stock of goods which should thereafter be added to his stock by purchase or otherwise, during the existence of the said mortgage to him, and also all such accounts, notes, and bonds that might be due and owing to him, the said Michael Foot, during the existence of said mortgage, the pretense for said mortgage deed being" that the said Michael Foot owed the said Samuels a note for five thousand dollars, bearing even date with the mortgage.

7th. That on the 7th of February, 1885, the said Michael Foot executed a second mortgage to the defendant, Klettner, on the same property covered by the mortgage to Samuels, the pretended consideration of which was a debt for five thousand dollars which he professed to owe said Klettner.

8th. That these three mortgages were recorded in the proper office, on the 9th of February, 1885, during the term of the court at which plaintiff recovered its judgment above mentioned.

9th. That the assignment above referred to bears date the 29th of February, 1885, but was executed on the 19th day of that month, "immediately before, and in anticipation of the levy of plaintiff's execution": that the assignment undertakes to convey to the said Mordecai Foot all of the real estate of said Michael Foot, and also all his goods, accounts, notes, and bonds, for the purpose of having the same sold by said Mordecai for such prices and upon such terms as he may see fit, and applying the proceeds, first, to the payment of the costs and expenses of the

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assignment, together with rents and taxes, and next to the payment of all the debts of the said Michael, giving a priority, however, to "any debts that may be already secured by pledges, mortgages, judgments, or other liens or incumbrances upon said property or any part thereof that the law shall require to be first paid."

10th. That the said Michael Foot has thus placed his property beyond the reach of the plaintiff's execution unless said mortgages and assignment are set aside.

11th. "That the said Michael Foot was probably insolvent at the time he executed the first of the above described mortgages, and has so continued ever since; that he was certainly insolvent before executing the assignment above described, if he owed any considerable portion of the debts alleged in the said mortgages to be owing from him;" that various other creditors, to a large amount, of said Michael Foot have issued attachments against his property; that said assignment is void on its face by reason of illegal preferences therein given; that the plaintiff is informed and believes that the indebtedness which the several mortgages purport to secure, is pretensive and that said Michael owes the mortgagees nothing; that said mortgages were not executed in good faith, but were given with the intent to hinder, delay, and defraud the creditors of said Michael Foot, and that the assignment was executed with like purpose.

12th. That the creditors of Michael Foot are very numerous, and the names of some of them not known to the plaintiff or its attorneys.

We concur with the Circuit Judge that this complaint does state facts sufficient to constitute a cause of action, and we only propose to consider the several grounds wherein it is alleged, in the argument, to be deficient.

First, it is contended that inasmuch as this action is brought by the plaintiff in behalf of itself, and all other creditors of Michael Foot who shall come in, seek relief by, and contribute to the expense of these proceedings, and inasmuch as it is not alleged that any other creditor is a judgment creditor of Michael Foot, the facts stated are not sufficient to constitute a cause of action. This contention is based upon the assumption that, in a creditor's

bill, *all* of those in whose behalf the action is brought must be judgment creditors. We do not think that such an assumption is well founded, and, on the contrary, we agree with the Circuit Judge, that "there is nothing in our practice which requires all or any of the creditors in whose behalf the action is brought, except the one named as plaintiff, to be judgment creditors." The reason of this is obvious. If any one of the creditors is in a position to institute the action, he may do so; and if the action results in making equitable assets, then all the others, even simple contract creditors, are entitled to share therein, and hence the action may be brought for their benefit, even though they might not be in a position to enable them to institute the action on their own behalf. If the person named as the plaintiff is a judgment creditor, and has exhausted his legal remedies, then he may maintain an action to set aside a fraudulent deed whereby property has been placed beyond the reach of his execution, and when such deed is set aside the other creditors, as a matter of equity, are entitled to share in the proceeds of the property thus subjected to the payment of debts, and hence the action may be instituted by the judgment creditor on his own behalf as well as on behalf of the other creditors, who, though not entitled to bring such an action, are, nevertheless, equitably entitled to share in its fruits.

Next, it is contended that the plaintiff did not have such a judgment as it was entitled to enforce, inasmuch as under the ruling in *State v. Moses* (18 S. C., 373), the judgment in favor of the plaintiff stood only as a security for those who may have sustained damage by reason of the breach of the condition of the bond, who must come in by proper proceedings and establish their claims, and there is no allegation that this had been done. To say nothing of the fact that it does not appear in the complaint what was the character of the judgment in favor of the plaintiff, and that under a demurrer no fact can be considered which does not so appear, it is quite sufficient, in answer to this objection, to say that it does appear in the complaint that the judgment was, not only for ten thousand dollars, which is assumed to have been the penalty of the clerk's bond, though that fact is not stated in the complaint, but was also for the sum of one hundred and sixty-

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six 79-100 dollars, costs and disbursements, which, of course, could have been immediately enforced by levy and sale of the judgment debtor's property, if any could have been found subject to levy and sale. So that, even assuming that the plaintiff's judgment, so far as the ten thousand dollars was concerned, was not enforceable without further proceedings, yet the judgment unquestionably was immediately enforceable for the amount of the costs and disbursements, and that furnished a sufficient basis for this action.

Again, it is contended that the complaint was defective in not containing any allegation that the plaintiff's execution had been returned *nulla bona*. Whether the other allegations in the complaint would be sufficient to amount, practically, to such an allegation, need not now be considered, inasmuch as it has been determined that such an allegation is not necessary to the validity of such a complaint. *Burch v. Brantley*, 20 S. C., 503.

The next ground taken by appellants is that even if the plaintiff is entitled to maintain this action against the mortgagees, it cannot be maintained against the assignee, inasmuch as the judgment in favor of plaintiff was entered the day before the execution of the deed of assignment, and thus having a prior lien on the property embraced in the assignment, the plaintiff was entitled to no equitable relief as against the assignment because none was needed. The question here raised falls more properly under the second ground of demurrer, and its consideration will be deferred until we reach that ground, only remarking now that it appears from the assignment, which is exhibited as a part of the complaint, that it covered property not subject to levy and sale under an execution, or at least property of such a character as it would be very difficult, if not impossible, to reach in that way, and to that extent, at least, a cause of action was stated against the assignee.

Again, it is urged that if the plaintiff be entitled to maintain this action against the mortgagees of the personal property, it cannot be maintained against Oberdorfer, the mortgagee of the real estate, because there is no allegation in the complaint that the property embraced in that mortgage was insufficient to pay the mortgage debt, and hence the plaintiff, for aught that appears,

has a plain and adequate remedy at law against the property covered by that mortgage. The meaning of this, as we understand it, is that the plaintiff could have levied on and sold the equity of redemption, as it is termed, of the judgment debtor in the real estate covered by that mortgage, and until that was done it could not be known whether it would be necessary to sell the whole interest in the property. It seems to us that this position of the appellants is based upon an assumption unfounded in fact, for it is alleged that the debtor, Michael Foot, has rendered it impossible for the plaintiff to collect the amount due on said judgment unless the assignment and the mortgages are set aside. Now, if this allegation be true, as, under the demurrer it must be taken to be, then it amounts to an allegation that, if the mortgages are allowed to stand, the debt due the plaintiff cannot be collected, and this could not be true unless the mortgage debts were sufficient to consume the mortgaged property.

Finally, it is urged that as the assignment embraces all of the property of the debtor, and provides for the payment of all his debts, without any illegal preferences amongst the creditors, it cannot operate to hinder or delay the creditors. What force there may be in this position when the case comes to be tried upon its merits, we do not propose now to consider, but its pertinency to the question raised by the demurrer is not apparent. We will only say that if, as alleged, the assignment was executed with a fraudulent purpose, and if, as is apparent from its terms, it places the disposition of the property of the debtor, which otherwise would be immediately subject to levy and sale under an execution in favor of creditors, absolutely under the control of the assignee, to be disposed of at his discretion; and if it provides, as it does, for the payment of mortgage debts alleged to be pretensive and fraudulent, before the payment of plaintiff's judgment, it would seem to be clear that a sufficient cause of action for setting it aside has been stated.

We agree, therefore, with the Circuit Judge, that the first ground of demurrer cannot be sustained.

As to the second ground that several causes of action are improperly united in the complaint, we also agree with the Circuit Judge in the conclusion which he has reached. It seems to us

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that there is really but one cause of action stated in the complaint, arising from the right of the creditors to have the property of their debtor applied to the payment of their debts, which right has been invaded and sought to be defeated by the fraud of the debtor. participated in by the other defendants, in attempting to place his property beyond the reach of his creditors, or so entangling it with fraudulent claims as to offer serious obstructions to any attempt to reach it by the ordinary process of law. The fact that the other defendants participated in the fraud of the debtor at different times, and that their fraudulent claims affected different portions of the property, cannot affect the question.

This view is fully sustained by the authorities cited by the Circuit Judge and by the counsel for respondent, as will be seen by reference to some of these authorities. In *Pomeroy on Remedies*, section 349, it is said: "If the debtor has at different times assigned, in alleged fraud of his creditors, different parcels of his property to different assignees, or if different parcels of property are held by different persons in alleged fraud of the debtor's creditors, so that the equitable ownership is claimed to be vested in him, all of these assignees, or all these holders of the legal title, may be joined with the debtor as co-defendants in one action. The reason given for this rule, permitting separate assignees or holders of the legal title to be joined, although they take by different conveyances and at different times, is, that they all have a common interest centering in the point at issue in the cause; so that, while the title to one piece of property is in one defendant, and the title to some other distinct piece is in another defendant, yet these various titles were taken and are now held for a common purpose, and to accomplish the same fraudulent end. All are privy to, have been concerned in, acts tending to the same illegal result. The matters are not distinct, but are, in truth, all connected with the same fraudulent transaction in which all the defendants have participated."

This was the rule in the former Court of Equity, which, as is said in *Pomeroy on Remedies*, section 480, has not been changed in this respect, by the code. In *Brinkerhoff v. Brown* (6 Johns. Ch., 139), it was held that a bill may be filed against several persons, relative to matters of the same nature, forming a con-

nected series of acts, all intended to defraud and injure the plaintiffs, and in which all of the defendants were more or less concerned, though not jointly in the same act. So far as the principles involved are concerned, that case, upon examination, will be found very much like the one now under consideration. In *Williams v. Neel* (10 Rich. Eq., 338; 73 A. D., 94), a creditor's bill to set aside deeds made at different times, for different pieces of property, to the several defendants, was sustained. The same doctrine was recognized in *Barkley v. Barkley*, 14 Rich. Eq., 12.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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BOOZER v. TEAGUE.

1. It being shown that the legal title to land was once in a party, it is incumbent on those who assert that such title has passed out of him, to prove it.
2. A deed absolute in terms cannot be shown by parol to have been upon condition that the grantee should pay two notes of the grantor outstanding against the land.
3. An absolute deed in the usual form, contained a general warranty qualified by the additional words—"except as regards the two notes given for the purchase money." Held, that these additional words did not raise any ambiguity, but in the light of the fact that this grantor had left unpaid two notes, secured by mortgage, given by her when she had purchased from a former owner, were intended only to except this encumbrance from her warranty.
4. There was no evidence in this case to show any accident or mistake in the terms of the deed.
5. Where the answer denies that plaintiffs hold the legal title, they are not in a position to urge the specific performance of a contract to convey; and such defences are wholly inconsistent.
6. The evidence here of a contract to convey land was too loose and shadowy to sustain a claim for specific performance; and, as it rested wholly in parol, is obnoxious to the statute of frauds—the payment of the purchase money and the retention of a possession, which was not taken in pursuance of the contract, not being such part performance as would take a case out of that statute.
7. The court cannot decree specific performance of a contract for the sale of land contained in a letter, unless the letter contains all the mate-

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rial terms of the contract. It is not sufficient, if it requires parol evidence to supplement it.

8. A grantor who erects improvements on the land of her grantee, and pays obligations resting on this land, created by her while in her possession, but which her grantee agreed to pay, cannot rely upon these matters to raise a contract for reconveyance.
9. An executor brought action for the sale of his testatrix's lands in aid of assets, alleging that testatrix died seized and possessed of a tract of 295 acres and also of a tract of 60 acres. An infant defendant put in a formal answer by guardian *ad litem*, submitting his rights to the protection of the court. The master reported that testatrix died *in the possession* of these two tracts, and recommended a sale of a part of the larger tract, and this report was confirmed. *Held*, that testatrix's *seizin* of the 60 acre tract was not *res judicata* as to this infant.
10. The minority of one co-tenant protects the interests of his adult co-tenant from the operation of the statute of limitations.
11. A party defendant to an action for the recovery of land in which she has an interest, although she has not answered, may testify to the fact that she had received a letter from the person, now deceased, under whom the plaintiffs claim, but may not testify as to the contents of such letter.
12. Declarations of a former owner, now deceased, of the land in suit, may be proved—not in support of his title, but in reply to testimony that he had never claimed the land.
13. And such evidence in reply being received, the Circuit Judge committed no error in refusing to permit defendants to reply thereto—especially where (the case being heard by the judge without a jury) the evidence so excluded was presented in the form of affidavits on a motion for new trial, and then fully considered.
14. The findings of fact by the Circuit Judge were sustained by the evidence.
15. Where a party pays money for another in whom was previously the legal title, there is no resulting trust.

Before KERSHAW, J., Newberry, February, 1886.

The Circuit decree in this case was as follows:

This action was submitted to be heard and determined by the judge without a jury, at the February term of the court, upon the testimony and arguments of counsel. The facts, as I find them, are as follows: On the 9th day of November, 1871, Elizabeth C. Teague, at the request of John D. Boozer, her son by a former marriage, agreed to purchase a tract of land for him from one E. T. Whitman, for the sum of \$960, to pay one-third



of the purchase money in cash, and give her notes, secured by a mortgage of the land, for the balance, each for one-half thereof, payable one at one year and the other at two years from that date; the cash payment to be made a gift to her said son, and he to meet the payment of the notes aforesaid when they became due. In pursuance of said agreement, the purchase was made, the cash paid, the land duly conveyed to the said Elizabeth C. Teague, the notes made and delivered, and a mortgage duly executed and delivered to the said E. T. Whitman, to secure the payment of the notes aforesaid. On the same day, and at the same time, a deed of the same land was duly made and delivered by the said Elizabeth C. to the said John D. Boozer, conveying the same to him in fee, for the consideration expressed in the deed of \$960, in the usual form, except that after the usual clause of warranty the following words were added, "except as to the notes given for the purchase money." These deeds and mortgages were duly recorded.

At the time when these transactions occurred John D. Boozer lived with his mother on the home place. He exercised ownership over the land, and bargained with his mother for a small piece of her land adjoining the Whitman place, with the purpose of building a residence thereon, and procured and had delivered there a portion of the lumber and other material for the construction of the proposed buildings. In 1872, soon after these transactions, the said John D. Boozer got into some trouble with the authorities then controlling the State, and left the State for some time. During this time his mother advanced for him a considerable sum of money—from seven to nine hundred dollars. After his return he told his mother he would give up the land to her, on account of the expense and trouble he had been to her. She then paid up her two notes for the purchase money of the land and had the mortgage satisfied. John D. Boozer resided three years after his return with his mother, and exercised no ownership over the land, but it was occupied from the time he left the State, in 1872, to the time of his marriage, by tenants of his mother, who received the rents and paid the taxes thereof, and also cleared land and erected buildings thereon.

In the latter part of the year 1876 John D. Boozer conversed

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with G. A. Langford, the eldest brother of the plaintiff, their father being dead, with reference to his proposed marriage with her, and represented to him that he owned the Whitman land, spoke of building on that land, and asked Langford to help haul lumber to put up the buildings. He married on January 31, 1877, and died within three months thereafter, leaving his widow, the plaintiff, surviving, who was then pregnant with her child, the defendant, John D. Boozer, who was born in due course of gestation thereafter, and is now in his ninth year. During his brief married life, the said John D. Boozer exercised acts of ownership over the Whitman land, and erected thereon a crib, residing with his wife's mother, and passing frequently to and from the Whitman place. The said Elizabeth C. Teague died in March, 1876, leaving a will, of which the defendant, Charles C. Teague, her husband, was appointed executor, leaving her estate to her children and the children of her said husband by a former marriage, who are defendants hereto, and John D. Boozer, deceased.

The defendants, except John D. Boozer, have been in possession of the said land ever since the death of the said John D. Boozer, the average rentals whereof are worth about one hundred and ten dollars per annum. This action is brought by the said Jane E. Boozer to recover the possession of the said land for herself and her son, John D. Boozer, the defendant. No demand was made by the plaintiff for the possession of the land until the commencement of this action, May 15, 1885, she having been in ignorance of the existence of the deed from E. C. Teague to the said John D. Boozer, deceased, until a recent period.

CONCLUSIONS OF LAW.—1. That the plaintiff and the defendant, John D. Boozer, are entitled to the possession of the land described in the complaint, as heirs at law of John D. Boozer, deceased. 2. That they are entitled to recover from the defendants, other than John D. Boozer, one hundred dollars, damages for the detention of the said land, since the commencement of this action.

My reasons for the above findings and conclusions are as follows: It will not be denied that John D. Boozer became seized in fee of the land in question by the execution and delivery of the deed of Elizabeth C. Teague conveying the same to him. It

is not claimed that he ever conveyed away that estate. It follows that he died seized, and that the land descended to the heirs at law—the plaintiff and her infant son, John D. Boozer. It also follows that they are entitled to the possession of the land, unless it has been shown by other claimants that they have an equitable title to the same. That could only be in case they have shown that there was a resulting trust to the said Elizabeth C. Teague, attending the purchase of said land by her, or that there was such a contract of sale of the same between her and John D. Boozer, accompanied by delivery of possession under the contract, as would entitle her devisees to a decree for the conveyance of the land in a proper case for that purpose.

Here are none of the elements of a resulting trust. It only remains to inquire whether there was such a contract for the sale or conveyance of the land as will defeat the legal title of the plaintiff and her son. All the evidence tending to show such a contract was objected to by the attorney for the plaintiff, and was taken and reserved to be considered by the court if found admissible, or rejected, if found to be irrelevant or inadmissible. All the testimony not derived from communications between the deceased, John D. Boozer, and any party in interest testifying thereto, tending to show the circumstances under which the deeds were executed, under which John D. Boozer obtained title to the land, I have considered as admissible; such as consisted of declarations of John D. Boozer made to parties in interest, who were examined as witnesses thereof, I have considered as inadmissible, and have, therefore, rejected it. There was in the deed from Mrs. Teague to John D. a warranty, the terms of which were peculiar and required explanation. Extrinsic evidence was admitted, not to vary or contradict the deed, but to explain what was ambiguous in it. *Whar. Evid.*, § 956.

I have also considered all the testimony tending to show that John D. Boozer agreed to give up the land to his mother, on account of the trouble he had caused her, and the money she had advanced and paid for him in 1872, except such as were sought to be proved by parties in interest, consisting of communications between such parties and the said John D. Boozer. I include in the rejected evidence the testimony of Mrs. Mills, in relation to

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the contents of a letter said to have been written to her by John D. Boozer. It was a communication to her, and proposed to be proven by her testimony, by parol upon some proof of the possession of the letter. I considered this rejected evidence inadmissible under the code, section 400. I would have rejected all testimony of the parties as to the communications between John D. Boozer and Mrs. E. C. Teague for the same reason, if I did not consider myself concluded by what is said in the case of *Hughey v. Eichelberger*, 11 S. C., 49. I would have said that the legislature meant to have excluded the testimony of parties under such circumstances as to declarations made by one party, deceased, to another party, deceased, where there was no other living witness, or, at least, that such was the policy of the law. But, as I have said, I consider the point settled by the decision referred to.

Excluding the testimony thus rejected, there is not sufficient evidence of such a contract as would entitle the defendants to the possession of the land as against the holders of the legal title. The fact is, that the answers of the defendants do not set up any such contract. They rely upon a parol agreement to show that John D. Boozer gave up the land to Mrs. Teague, and asks that the deed from her to him be cancelled, upon the idea that the legal estate remained in Mrs. Teague after such agreement. The legal estate could not be revested by any such agreement. *Fripp v. Fripp, Rice Ch.*, 85. The parol evidence of such agreement was only admissible under the pleadings as tending to support the denial of the answers, that the defendants wrongfully withheld the possession of the land from the plaintiffs. If the parol agreement was of such a character as to entitle the defendants to such a decree for a conveyance, it could be availed of to defeat the action to recover the possession. *Pom. Rem.*, § 94; *Chase v. Peck*, 21 N. Y., 581. It is there said, "The defendant may defeat the action upon equitable principles; and if upon the applications of these principles the plaintiff ought not to be put in possession of the land, he ought not to recover."

The only evidence of a contract in terms is that of the defendant, Charles C. Teague, to a conversation between Mrs. Teague and John D. Boozer, held after his return from exile. His testi-

mony was as follows: "Immediately after John D. Boozer came back she said to him, 'You know the distress you were in, and the trouble I was brought to, are you going to stand to your contract? I think you ought to give up the land to me.' He said he would." The same witness testified, after having been recalled, that she paid for the land after the conversation. He said to other witnesses that he had been "to a great deal of expense and trouble to his mother, and he expected never to have anything more to do with the land; that was the night after his return from the west, he said he never intended ever to have any more to do with it." He told his mother in the presence of Mrs. Mills, the defendant, "that she had advanced money for him that he needed, and he did not care to take the place."

There was no change of position between the parties after these conversations or declarations, except that Mrs. Teague paid her notes given for the land and had the mortgage satisfied. She was bound for these notes to the Whitmans, and there is nothing to show that she paid them in consideration of the alleged return of the land, or more properly, the promises of John D. Boozer to give it up. The land was bound for the payment of the notes. If she had so preferred, she might have allowed the land to be sold to pay debts and bought it in, and so have perfected her title to it. John D. Boozer had undertaken, with her, to pay the notes himself, and she had taken care, in her deed to him, to make the land stand as a security that he would do so; but when she came to pay the debt, she chose to destroy the only security she had to enforce the simple promise that he would pay the debt. He was her son by a former marriage; her property had been derived, in part at least, from his father. She had married again and had other children. Is it not possible, or probable even, that she did not care to take back the land farther than to occupy and use it as she did, leaving the title where it was? Where is the clear and satisfactory evidence that she did not intend to do just what she did? Who is to say that this was not just what she meant and understood between her and her deceased son?

This consists with his conduct with regard to the land after his mother's death. It was also consistent with his representa-

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tions made to Langford, when speaking to him in reference to his marriage proposal for his sister, when he said he owned the land, and spoke of building, &c. It appears that he did not interfere with his mother's possession while she lived, but took charge of the land after that. It also appears that she took no steps to procure a title from him. The conversation testified to by Charles C. Teague, as having been had between him and his mother, while it indicates that something had passed which she spoke of as a contract, does not with certainty show what it was. The language of Mrs. Teague as represented, "Are you going to stand to your contract? I think you ought to give up the land to me," does not convey the idea that there had been a binding contract in regard to that before, but only that something had been said by him which induced her to think that he ought to give up the land to her. He admitted this moral obligation by responding that "he would." He did accordingly give up the land to her and she enjoyed it for the remainder of her life. Putting her possession with that of the devisees, the present defendants, they held the land long enough to repay the amount for the land out of the rental value. If he had made a deed of the land to his mother, without words of inheritance, it would only have conveyed a life estate; upon what principle, then, can we give greater effect to a verbal agreement, to term it most favorably to the defendants, to give up a tract of land to another?

On the whole, I cannot find sufficient evidence to overcome a legal title, and the consequent right of possession, established by the plaintiff. I am better satisfied with this result, when I consider that the defendants have so long enjoyed the possession of the land, as to satisfy whatever equity they might be supposed to have by reason of the payment by Mrs. Teague of that portion of the purchase money that had been assumed by John D. Boozer. As the possession of the defendants was acquiesced in for so long a time by the plaintiff, even though it resulted from ignorance of her rights (which ignorance might have been removed by searching the registry of deeds), I have not found damages for the retention of the land except from the commencement of this action, no demand having been made for possession before that time. As for the improvements claimed to have been

made on the land by the defendants and Mrs. Teague, they could not have been made in ignorance of the legal title, and nothing can be adjudged in regard to them under the circumstances of this case.

It is therefore adjudged, that the plaintiff, Jane E. Boozer, and the defendant, John D. Boozer, do recover of the defendants, Charles C. Teague, David S. Teague, Abram M. Teague, Frances E. Mills, Charles A. Teague, Lola A. Teague, Lucy E. Teague, and James J. Teague, the possession of the real property described in the complaint, and also the sum of one hundred dollars damages for withholding thereof, and                      dollars costs of this action.

Defendants made a motion for a new trial, upon which his honor passed the following order :

A motion upon notice was made in this case for a new trial. At this special term it was on the docket, but could not be heard for want of time. For the convenience of parties, and as understood without objection, it was deferred to be heard after the adjournment of the term, on written argument. Objection is made to the hearing now on the written argument submitted, for the want of jurisdiction. I consider that the court's jurisdiction is retained under the circumstances. I have with some care considered the arguments submitted and can see no good reason for granting a new trial. If the evidence in regard to the building of the crib on the land were rejected, and the contents of the letter said to have been written by John D. Boozer to his sister were admitted, I would still be of the opinion that there was no sufficient proof of a contract to reconvey the land to Mrs. Teague by John D. Boozer, to deprive the plaintiff and her son of their legal rights in the premises. The alleged contract was not sufficient under the statute of frauds. The terms of it are uncertain in that it does not indicate what estate Mrs. Teague was to have under it. There was no change of possession after it was made. The proof is not clear that the consideration of the money advanced by Mrs. Teague for Jno. D. Boozer was the alleged agreement. Nor that she did not intend to do just what she did, to wit, occupy the land while she lived and leave the title in her son, John D. Boozer. Nor that it was not entirely

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satisfactory to her that he should have the land after her death, or when she was satisfied. As to a refusal of a right to reply: the defendants had no such right. The court *ex gratia* in peculiar cases, and in furtherance of manifest justice, may permit such reply, but it is in no sense a matter of right. I do not consider the additional evidence such as entitles the defendants to a new trial. Authorities: "Acts as part performance, to elude the statute, must be done in strict pursuance of a specified and certain agreement." *Church of Advent v. Farrow*, 7 *Rich. Eq.*, 378. Mere retention of pre-existing possession will not take a case out of the statute of frauds; change of possession is necessary. *Poag v. Sandifer*, 5 *Rich. Eq.*, 170. The word "heir" is necessary to create an estate of inheritance if created by deed. 4 *Kent*, 5. "The example at law was followed by the Courts of Equity, and the same legal construction applied by them to a conveyance to uses." *Id.*, 6. The legal action has altered this rule as to devises, but not as to deeds. A. A., 1824.

The strongest statement of the contract (so-called) is made by C. C. Teague, who testified that he read the letter to his sister, said to have been written. He says: "He said he was in great trouble, and must have assistance, and if she could assist him in any way, he was willing to relinquish his interest in the Whitman place to procure the money he desired." How much money was not stated. If the writing had been produced and was otherwise sufficient under the statute of frauds, it could not have been enforced in that form. Nothing can be supplied by parol, &c. *Hyde v. Cooper*, 13 *Rich. Eq.*, 257. The contract might have been waived by Mrs. Teague, and failure to demand a conveyance from Jno. D. Boozer while she lived, taken in connection with other circumstances in the case, lead me to the conclusion that she did not intend to require him to relinquish to her his interest in the land.

It is ordered and adjudged, that the motion for a new trial be refused.

The defendants appealed upon the following exceptions:

Because his honor erred:

I. As to testimony: 1. In excluding the testimony of Mrs. Fanny Mills, offered to prove the reception and contents of a let-



ter from John D. Boozer to her, which was lost. 2. In excluding the testimony of C. C. Teague, David S. Teague, A. M. Teague, Mrs. Fanny Mills, and others, offered to prove the conduct and declarations and admissions of John D. Boozer in reference to the land in question. 3. In allowing testimony for the plaintiff against the objection of the defendants and to their surprise, to show that John D. Boozer had charge of the land after his mother's death and built a crib upon it, which was shown on motion for new trial, by disinterested witnesses, to be a mistake. 4. In refusing to allow the defendants to reply thereto, to show that such testimony was a mistake.

II. As to the facts: 1. In holding that John D. Boozer ever exercised ownership over the land. 2. In holding that after the death of his mother he resumed the control of the land and exercised ownership over it. 3. In holding that the declarations of conduct of John D. Boozer, admitted, did not show that he entirely abandoned the land to his mother and disclaimed all right thereto, for a sufficient consideration.

III. As to the law: 1. In not holding that the title to the land, as to the defendant, John D. Boozer, was *res adjudicata*, and it had been adjudged to be the property of Elizabeth C. Teague, and in not holding that as to the plaintiff this action was barred by the statute of limitations. 2. In holding that the defendants did not show such equitable title to the land as to bar its recovery in this action. 3. In holding that the rents and profits of the land to the commencement of this action were sufficient to have repaid the money Elizabeth C. Teague advanced to John D. Boozer, and the amount she paid in satisfaction of the notes for the land. 4. In not considering the expenses incurred by the defendants in improvements upon the land as essential in determining their rights. 5. In refusing to hold that the deed from Elizabeth C. Teague to John D. Boozer should be cancelled. 6. In failing to hold that the title to the land should be reconveyed to the estate of Elizabeth C. Teague. 7. In failing to hold that the land should be held responsible, under the deed and mortgage, for the money paid therefor by Elizabeth C. Teague. 8. In failing to hold that the land should be held responsible for the money advanced to John D. Boozer by his mother.

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9. In refusing to hold that, under the terms of the deed and the contract in regard to the purchase of the land, it reverted to Elizabeth C. Teague upon the refusal of John D. Boozer to pay the notes therefor and her payment thereof. 10. In not granting the motion for new trial, both upon the questions of law and fact upon which it was grounded.

*Messrs. Moorman & Simkins*, for appellants.

*Messrs. Goggans & Herbert*, contra.

October 10, 1887. The opinion of the court was delivered by

MR. JUSTICE MCIVER. This was an action brought by the plaintiff to recover a certain tract of land, known as the Whitman place, for the benefit of herself and her infant son, John D. Boozer, jr., who, because of his minority, has been made a defendant. Her claim is based upon the allegation that her deceased husband, John D. Boozer, sr., died seized and possessed of the land, and she, as his widow, and their infant son, John D., being his only heirs at law are entitled to recover possession of the said land from the other defendants, who, it is alleged, wrongfully withheld the possession from them. The claim of the defendants (except John D. Boozer, jr., who, though nominally a defendant, is practically one of the plaintiffs, and will be so treated throughout this discussion), on the other hand, is that the land in controversy really belonged, equitably, if not legally, to Elizabeth C. Teague, and that they, as her devisees, are entitled to retain possession thereof. The case was by consent heard by Judge Kershaw without a jury, who rendered judgment in favor of the plaintiff, refusing a motion for a new trial submitted by the defendants, and from such judgment, as well as the order refusing the motion for a new trial, all of the defendants except Mrs. Frances E. Mills and John D. Boozer, jr., appeal, upon numerous grounds set out in the record.

The decree of the Circuit Judge states so fully and clearly the facts of the case, and so satisfactorily vindicates the correctness of his conclusions, that but for the earnestness with which this appeal has been urged, it would scarcely be necessary to add anything to what he has so well said.

There cannot be a doubt, after reading the voluminous testimony set out in the "Case" (though even this is denied in the answers of the defendants), that on November 9, 1871, Mrs. Elizabeth C. Teague made an absolute deed to her son by a former marriage, John D. Boozer, sr., for the tract of land in controversy, which had been conveyed to her by one Whitman on the same day. So far as we can learn, the deed was in the usual form, with a general warranty, qualified by these words: "except as regards to the two notes given for the purchase money." The title having thus been vested in John D. Boozer, sr., must necessarily now be in his heirs at law, unless it has passed out of him in some way. The fundamental inquiry, therefore, in the case is, did this title ever pass out of John D. Boozer, sr., in his lifetime? for there is no pretence that his heirs at law have, since his death, been divested of the title, except, perhaps, by the statute of limitations, of which we will speak hereafter.

To maintain the defence set up the burden is upon the defendants to show that the title did, during the life-time of John D. Boozer, sr., pass back to his mother, Mrs. Elizabeth C. Teague, under whom defendants claim. This they claim has been done in several ways. First, they contend that the deed from Mrs. Teague to her son Boozer was made upon condition that he was to pay the two notes given by Mrs. Teague to Whitman for the credit portion of the purchase money, and that by reason of the breach of such condition and the re-entry by Mrs. Teague the title reverted in her. But there is no such condition inserted in the deed, and it is quite certain that parol evidence is wholly insufficient to establish such a condition, for that would be a very material addition to the deed, essentially varying its legal effect. *Mowry v. Stogner*, 3 S. C., 251; *Hammond v. Railroad Company*, 15 *Id.*, 10.

It seems to us that the Circuit Judge went as far as he well could have done, in favor of the defendants, perhaps too far, in receiving parol evidence to explain what is termed the ambiguity arising from the words above quoted, which were inserted in the clause of warranty. It does not seem to us that those words raised any ambiguity at all. The evidence clearly shows that Mrs. Teague bought the land from Whitman for her son, paying

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the one-third of the purchase money in cash, *as a gift* to him, and giving her two notes for the credit portion which it was understood were to be paid by her son. Now, inasmuch as she had given a mortgage on the land to Whitman to secure the payment of these two notes, it was quite natural and proper when she conveyed the land to her son, to insert in the warranty an exception so far as the two notes were concerned, so that if Whitman should find it necessary to foreclose his mortgage and sell the land, the son would have no recourse upon his mother for breach of the warranty in the deed to him, which, without the words inserted, he undoubtedly would have under a general warranty, unqualified by such an exception. It seems to us that the words inserted plainly meant this, and nothing more—that Mrs. Teague warranted the title to her son against all persons except the mortgagee, who might enforce payment of the notes out of the land. Be this as it may, however, it is quite certain that neither the evidence adduced nor any other parol evidence would have been sufficient to incorporate in the deed such a condition as that claimed by defendants.

Again, it is urged that the failure to insert such a condition in the deed was the result of accident or mistake, and that a Court of Equity will grant relief against such an omission by reforming the deed. Without going into the legal aspects of such a contention, it is quite sufficient to say that there is no evidence whatever upon which to raise the question. The testimony of the scrivener, who drew the deed, shows that it was drawn in accordance with the wishes and instructions of the parties, and the very fact that the words above quoted were inserted in the clause of warranty is evidence that the matter of making provision for the payment of the notes was not overlooked at the time. Indeed, there is a total lack of any evidence whatever to show that anything was omitted from the deed which the parties intended or desired should be inserted. The most that can be said of it is that the old lady expected her son to pay the two notes, but that she took no steps to bind him legally to do so. All that she did do, and all that the evidence shows she desired to do, was to protect herself against any claim for breach of warranty in case the mortgagee should find it necessary to sell the land, which she

conveyed absolutely to her son, under the mortgage which she had given to secure the payment of the credit portion of the purchase money.

Again, it is urged that there was a contract between John D. Boozer, sr., and Mrs. Teague, whereby he agreed to surrender the land to her in consideration of the payment by her of certain money for him, and that by reason of the performance on her part of the terms of such contract, he was bound to perform his part. This claim rests upon the doctrine of specific performance of a contract, and the first difficulty which the defendants have to encounter is that no such claim is set up in their answers. On the contrary, such a claim, resting as it does upon the assumption that the legal title was in John D. Boozer, is wholly inconsistent with the defences there set up. But, waiving this, it seems to us very clear that the defendants have wholly failed to make such a case as would entitle them, or their testatrix, to claim the specific performance of a contract for a reconveyance of the land. It is quite clear that the contract, if there was one, rested altogether in parol, and hence it is incumbent upon the defendants to show such a part performance as would take the case out of the operation of the statute of frauds.

We agree with the Circuit Judge that the evidence that there was any contract on the part of the said John D. Boozer, sr., to *reconvey* the land to his mother, if not altogether wanting, is of a very loose and shadowy character. The most that can be said is that Boozer, impressed with a feeling of gratitude for the kindness of his mother, in furnishing the money necessary to relieve him from serious trouble into which he had fallen, expressed a willingness to surrender the land to his mother. But there is a singular absence of any testimony tending to show that either the mother or the son ever supposed or understood that the land was to be reconveyed to her in consideration of the money which she had paid out to relieve him from his troubles. The inference to be drawn from the testimony is that the mother paid out this money, under the promptings of maternal feelings, to relieve her son from distress and not with any view or expectation of a contract for the reconveyance of the land, and that the son, upon his return from exile, prompted by a feeling of

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gratitude, and not as a matter of contract, declared his willingness to surrender the land to his mother, which he seems to have done. But it nowhere appears that this was a matter of contract, whereby he had bound himself to reconvey the land to his mother; and, accordingly, we find no evidence that any steps were taken, or even any wish expressed, to carry out such supposed contract by a reconveyance of the land.

But, even assuming that there was a verbal contract to reconvey the land, the question still remains whether there was such part performance as would relieve it from the operation of the statute of frauds. The mere payment of the purchase money would not be sufficient, even assuming that it was paid, although the evidence is far from clear as to the amount paid. Nor will the fact that Mrs. Teague was in possession be sufficient, for she did not take possession under and in pursuance of the alleged contract. *Poag v. Sandifer*, 5 Rich. Eq., 170; *Mims v. Chandler*, 21 S. C., 480.

It is urged, however, that the letter of John D. Boozer, sr., to Mrs. Frances E. Mills, his sister, the contents of which were testified to by C. C. Teague, was a sufficient compliance with the statute of frauds. The testimony of that witness as to this point was as follows: "He said that he was in great trouble and that he had to have assistance from some source or other, and if after speaking to his mother, through Fannie Mills, if she could assist him in any way, he was willing to relinquish all interest in the Whitman place to procure the money that he desired." Now, it is apparent that, if the letter itself containing this language had been introduced in evidence, instead of the verbal testimony of a witness as to its contents, it would not establish such an agreement as that its specific performance would be enforced by a Court of Equity. The rule being that the writing relied upon must contain all the material terms of the agreement, and that it cannot be supplemented by parol evidence (*Hyde v. Cooper*, 13 Rich. Eq., 257), this letter would be plainly insufficient. No amount being stated, it would be difficult for a court looking only to that letter to frame a decree for specific performance.

The fact that improvements were made on the Whitman place by Mrs. Teague during her life-time, and continued by defend-

ants since her death, cannot avail anything; for if there was no contract to reconvey, as we have seen, then such improvements were made with full knowledge that the legal title was in Boozer. Indeed, the evidence would seem to show that these improvements were commenced before there was any pretence that there had been any agreement to surrender the land, and consequently could not, with any propriety, be said to have been in pursuance of such alleged agreement.

The fact that Mrs. Teague paid the notes for the purchase money of the land after the conversation between herself and her son when he returned, cannot affect the question, for the witnesses who undertake to prove an agreement for the surrender of the land do not state as the consideration for such agreement the payment of these notes, but, on the contrary, state as such consideration the payment of the money which Mrs. Teague had advanced to relieve her son from the difficulties in which he had become entangled. She was legally liable to Whitman for the payment of these notes in any event, and if she saw fit to pay them and have the mortgage extinguished, instead of taking the proper steps to secure herself, such payment cannot be imported into the previous agreement, if there had been one, as part consideration therefor.

Again it is contended that the question of title as to the infant defendant, John D. Boozer, jr., has been already adjudged against him; and this being so, the plaintiff having lost the protection which she might otherwise claim under the disability of her infant son, is barred by the statute of limitations from maintaining this action. To sustain this defence of *res adjudicata*, the record of a proceeding instituted in the Court of Common Pleas by Charles C. Teague, as executor, soon after the death of Mrs. Teague, to which the infant defendant, John D. Boozer, jr., was a party, is relied upon. The object of that proceeding was to obtain an order for the sale of a portion of the real estate of Mrs. Teague in aid of the personalty for the payment of her debts. The complaint exhibited the will of Mrs. Teague whereby she disposed of "all her real estate" without further description or specification. Although it did not appear from the will that Mrs. Teague assumed to be the owner of the land in controversy,

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and did not undertake to dispose of it by her will specifically, yet it was alleged in the complaint that she died seized and possessed of a tract of land containing 295 acres, "also of an additional tract of 60 acres, known as the Whitman place." The minor, John D. Boozer, jr., appeared by guardian *ad litem* and put in a formal answer, submitting his rights to the protection of the court. The case was referred to the master, who, amongst other things, reported "that Elizabeth C. Teague died in the possession of the whole of the 295 acres of land, of which her former husband, John D. Boozer, died seized and possessed, and also 60 acres, more or less, of land, known as the Whitman place." This report was confirmed, and the court ordered that 100 of the 295 acres be sold to pay the debts and costs of the proceedings. After this no further proceedings were had in the case.

How this can be regarded as an adjudication of the title to the Whitman place, it is very difficult, if not impossible, to conceive. No such issue was necessarily raised, and none such was decided, or necessary to be decided, under the proceedings which were had in the case. True, the executor alleged that Mrs. Teague died seized and possessed of the Whitman place, and in the answer of the infant there is no denial, *in terms*, of that allegation, nor was there any necessity for such a denial on the part of the infant defendant. His formal answer, committing his rights to the protection of the court, was sufficient to raise any issue necessary for the protection or preservation of his rights; and if it had been deemed necessary to determine the question of title to the Whitman place, as it was not, then the formal answer would have been sufficient to raise that question. It cannot, therefore, with any propriety, be said that the infant defendant, by not denying in terms the allegation in the complaint, that *Mrs. Teague* died *seized* and possessed of the Whitman place, has thereby admitted such allegation. It will also be observed that the master in his report did not find that Mrs. Teague died *seized* and possessed of the Whitman place, but only that she died "*in the possession*" of that place. Indeed, the very fact that 100 acres of the 295 acre tract, about which there does not seem ever to have been any dispute, was recommended to be sold, instead of



the separate tract of 60 acres, the *legal* title to which was certainly not in Mrs. Teague, would seem to indicate a purpose not to decide anything in reference to the title to that tract; and this may be the reason why the master, although it was alleged in the complaint that Mrs. Teague died *seized* and possessed of the Whitman place, simply found that she died "*in the possession*" of that land, which finding was precisely in accordance with the facts as developed by the testimony in the present controversy. It is quite clear, therefore, that the plea of *res adjudicata* as to the infant, John D. Boozer, jr., cannot be sustained.

This being so, it is equally clear that the plea of the statute of limitations as to the plaintiff cannot be sustained, as she is protected by the minority of her co-tenant, John D. Boozer, jr. See *Hill v. Sanders* (4 Rich., 521), where it was held that the rule was well settled in this State, that the minority of one co-tenant will protect the interests of his adult co-tenant from the operation of the statute of limitations; and that the rule extends to tenants in common as well as to joint-tenants, and applies whether the infant co-tenant is joined in the action to try the title or not.

Our next general inquiry is, whether the Circuit Judge erred in his rulings as to the admissibility of evidence. It seems to us that the rulings of the Circuit Judge were strictly in accordance with the provisions of the code, and we do not see how this could be made more plain than it is made by the statements of Judge Kershaw in his decree. It is, however, earnestly contended that there was error in excluding the testimony of Mrs. Mills as to the contents of the letter received by her from John D. Boozer, sr. It will be observed that this witness, though a party to the record and directly interested in the result of the action, notwithstanding the fact that she put in no answer, was permitted to testify as to the loss of the letter, but was not permitted to testify as to its contents, for that would, in the face of the code, have been allowing her to testify as to a communication made to her by a party then deceased, under whom the plaintiff claimed as heir at law. This ruling was precisely in accordance with the decision of this court in the case of *Standridge v. Powell*, 11 S. C., 549.

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Again it is urged that the Circuit Judge erred in permitting respondent to prove declarations of John D. Boozer, under whom she claimed, as to his claim to the land after his mother's death. It will be observed that these declarations were not offered in support of John D. Boozer's *title* to the land, but simply to rebut the testimony offered by defendants, that he had never set up any claim to the land after his return from exile, as well as to explain his acts in taking possession of the land; and for these purposes the testimony was competent.

The complaint made by the appellants, that the judge erred in refusing them the privilege of replying to the testimony offered by the plaintiff in reply, cannot be sustained. In the first place it does not appear from the "Case," as prepared for argument here, that any objection was made to the plaintiff's testimony as not being in reply, or that any application was made to the court for the privilege of replying thereto. But as no objection upon this ground has been interposed by respondent's counsel, who, on the contrary, has impliedly, at least, admitted that the proper foundation was laid for this ground, we will assume that the objection was made, and the privilege asked for, at the proper time. Still we think there was no error in the course pursued at the trial. The defendants' case rested largely upon the alleged fact that John D. Boozer, sr., after his return never set up any claim to the land, and never resumed the possession thereof, and the testimony now in question was manifestly in reply to the evidence adduced by the defendants to sustain that position, and was, therefore, properly received as a reply to the defendants' evidence. This being so, it is clear that the defendants were not entitled, as matter of right, to the privilege of replying to the reply, though the judge might possibly, as matter of discretion, have allowed them that privilege. But in addition to this, the testimony which defendants claim they were improperly debarred the privilege of introducing, seems to have been presented to the Circuit Judge, in the form of full and voluminous affidavits, upon the motion for a new trial, and it is quite certain that if he had supposed that the exclusion of such testimony worked any wrong to the defendants, he would have granted a new trial. On the contrary, he says, after a careful consideration of the case, "I do

not consider the additional evidence such as entitles the defendants to a new trial."

As to those grounds of appeal which impute error to the Circuit Judge in his findings of fact, it is quite sufficient to say that we see no reason, under the well settled rule of this court, to interfere. The evidence was conflicting as to some of the most material positions, and it is quite clear that there is enough in the testimony to support the conclusions of fact reached by the Circuit Judge.

We have not deemed it necessary to say anything as to the claim that there was a resulting trust in favor of Mrs. Teague, for the reason that under the case of *Ex parte Trenholm* (19 S. C., 126), it is too plain for argument that such a claim cannot be sustained.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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WOODWARD v. ELLIOTT.

1. In an action for partition of an intestate's estate, the widow was made a party-defendant and duly served; and while the complaint did not state that she was the widow nor define her interest, but, on the contrary, seemed to class her as one of the children, yet throughout the progress of the case her share was treated as a third, she took part in the partition proceedings, and named one of the commissioners. *Held*, that she was bound by the sale which was ordered in the cause.
2. This defendant knew, or had the opportunity of knowing, everything that was done in the progress of the cause, and therefore no ground exists for opening the order of sale.
3. In November, 1885, the Circuit Judge, then under assignment to the Circuit, and while in the county where the land lay, had power at chambers to hear a case of partition and to render judgment therein, without the consent of all the parties to the cause.
4. But, it seems, that he has not such power while in a county other than that in which the land to be partitioned, or some part thereof, is situated.

Before WALLACE, J., Georgetown, November, 1886.

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The opinion states the case.

*Mr. R. Dozier*, for appellants.

*Messrs. Johnsons & Quattlebaum*, contra.

October 10, 1887. The opinion of the court was delivered by MR. JUSTICE McIVER. Some time in the year 1882, June Woodward, the elder, departed this life intestate, leaving as his heirs at law, his widow, Silla, and the six children named as such in the complaint, being seized and possessed, at the time of his death, of a certain tract of land situate in Georgetown County, containing about 400 acres, which is the subject matter of controversy in the present case. In July, 1884, an action was commenced by two of these children, viz., Amelia and Susan, against said Silla Woodward, the widow, though she was not named as such in the summons or complaint, or in any of the subsequent proceedings, but, on the contrary, from the phraseology of the complaint, seems to have been regarded at that time as one of the children of June Woodward, sr., as well as against the children of said June and the present defendant, Elliott,<sup>1</sup> for the purpose of partitioning said lands. None of the defendants answered, and on the 12th of November, 1884, Judge Kershaw granted an order for a writ of partition to issue, to be directed to three commissioners, directing them to partition the said land amongst the heirs of said June Woodward, according to their respective interests therein.

No further proceedings being had under this order, Judge Fraser, on May 8, 1885, granted another order, wherein, after reciting that the writ of partition previously authorized had been suspended, "pending a negotiation between the parties looking to a family settlement, which has not been effected," and that the number of commissioners mentioned in said order "are three, instead of five, the number now required," the former order was rescinded, and it was ordered that a new writ, directed to five commissioners, do issue, directing said commissioners to partition said land amongst the said parties according to their respective

<sup>1</sup> Who was a mortgagee.—REPORTER.

interests therein. Upon this order there is an endorsement signed by the clerk of the court, in these words: "I, this day, 14th day of May, 1885, mailed to plaintiffs and defendants notice of order of partition." In pursuance of this last mentioned order a writ of partition was issued, directed to the five commissioners therein named, requiring them to make partition of said land, by setting apart to each of the said parties "a proportion of said real estate to which they may be entitled respectively as heirs at law and distributees of the said June Woodward, deceased," with the usual provision that, in case such partition cannot be fairly made, a part or the whole be set apart to one or more of said parties, they making compensation to the others, so as to bring about equality of partition, or in the event that partition cannot be properly effected in either of these modes, then that the commissioners may recommend a sale, certifying their appraisement of the value of said land.

On August 18, 1885, these commissioners, all of whom appear to have acted, made their return, certifying that the land could not be fairly divided, and therefore recommended a sale of the entire tract, appraising its value at \$670. After this return was made, to wit, on August 22, 1885, Mr. Hucks, the attorney who commenced the action for partition, and who seems to have been regarded as counsel for all the parties, signed a paper consenting that the heirs of June Woodward, notwithstanding this return recommending a sale had been made, might make a settlement among themselves, provided the expenses already incurred should be provided for, and that the first of September be the period allowed for the same. These provisions not having been complied with, and so far as we can perceive from the evidence, no effort made to do so, on November 14, 1885, Mr. Hucks took an order for the sale of the land, which order was granted by Judge Aldrich at chambers while still in Georgetown, which is in the third Circuit, to which Judge Aldrich had been duly assigned. In pursuance of this order the land, after due advertisement, was offered for sale at public outcry, and bid off by one Ehrich at \$330, who transferred his bid to the defendant Elliott, who has received titles for the same; but there has been no order confirming the sale.

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A few months afterwards, to wit, on May 26, 1886, the present action was commenced by Silla Woodward and the then surviving children of the said June Woodward, against the said William F. Elliott and the heirs at law of June Woodward, the younger, one of the children of June Woodward, sr., who had died intestate on July 14, 1884, leaving as his heirs at law his widow and children named in the record, for the purpose of setting aside the sale made under the proceedings in the former action, and for partition of said land amongst the heirs at law of June Woodward, sr. The grounds upon which the sale is impeached are substantially as follows: 1st. Because Silla Woodward, though named as a party, and served with a summons in the previous action, was not really such because she was not named *as the widow* in the complaint or any of the proceedings, and her share as such was nowhere stated, but, on the contrary, the language of the complaint implied that she was regarded as one of the children of June Woodward, sr. 2nd. That the order of sale, as well as the sale itself, was made without the knowledge and against the wishes of all the parties, particularly Silla Woodward. 3rd. Because Judge Aldrich had no jurisdiction at chambers to make the order of sale.

All these grounds were overruled by the Circuit Judge, who rendered judgment that the plaintiffs were not entitled to the relief which they demanded; but that inasmuch as it now appeared that June Woodward, jr., had never been made a party to the previous action, inasmuch as the proof in this case showed that he had died three days before the copy-summons had been left at his late residence, his heirs at law were now entitled to have partition of the land, so as to set apart to them the share of their deceased father and husband, which was accordingly ordered, and to this part of the decree there was no exception. The plaintiffs, however, appeal upon the several grounds hereinbefore indicated.

The fact that Silla Woodward was not named in the previous action as the widow of the intestate, and her share of his estate specifically stated, does not seem to us material. There is not the slightest evidence that either she, or any of the parties, or the commissioners in partition, were in any way misled by such omis-

sion. On the contrary, the testimony abundantly shows that she was served with the summons, that she acted and was treated as one of the parties, perhaps the most active of any, that she persuaded one of the persons named as commissioner to act as such, and took a prominent part in the proceedings of the commissioners, and it will not do for her now to say, in face of these facts, that she was no party, simply because she was not described as the widow and as such entitled to one-third of the estate. Having been served with the summons, she either knew or ought to have known what the complaint contained; and if there was any erroneous statement of fact therein, or any material statement omitted, she had ample opportunity to have such error corrected or such omission supplied; and having neglected to do so at the proper time and in the proper way, she cannot now be permitted to take advantage of any alleged error or omission, especially when, as the Circuit Judge very properly says, it is perfectly manifest that the omission to describe her as widow and to specify the amount of her share as such, worked no injury to her interests, as her share was recognized throughout the proceedings as being that of the widow, one-third.

The second ground taken—that the order of sale was taken and the sale made without the knowledge or consent of the parties—is not in our judgment supported by the testimony. It may be, and no doubt is, quite true that in this case, as in many others, the parties interested would have preferred an actual partition rather than a sale, if the same was practicable. But when it was found, after diligent effort (the commissioners in partition having spent three days in ineffectual attempts to carry out the wishes of the parties), that this was impracticable, we think the weight of the testimony rather tends to show that the parties quietly acquiesced in what seemed to be inevitable; certainly it does not show that they made any active opposition to the course recommended by the commissioners unanimously, one of whom was specially chosen by the plaintiff Silla, and induced to act solely by a willingness to gratify her. So we think the testimony shows that the parties were fully informed that the commissioners had determined to recommend a sale, and they either knew or ought to have known that such recommendation would

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be followed by an order of sale, unless some steps were taken to prevent it; and yet, although some of the parties did go to the court house to see the attorney, to whom all the parties seemed to have been willing to commit their interests, and were advised by him to employ other counsel if they were dissatisfied, and were offered the opportunity to adjust the matter amongst themselves, even after the return had been made, yet nothing was done by them to prevent the sale, which was accordingly made after due advertisement, without objection from any quarter, although there is testimony tending to show that some, if not all, of the parties had actual notice of the time and place of the sale. Under these circumstances, and from a review of all the testimony in the case, we are unable to discover any ground upon which the plaintiffs can claim the relief demanded under section 195 of the Code, or under any other provision of the law. We are unable to discover the slightest evidence that anything was done or omitted which was calculated to mislead these parties or keep them in ignorance of their rights or interests in the premises; and if they have been so misled, it is due either to their own fault or to their ignorance, for which the law provides no remedy.

The only remaining inquiry is, whether Judge Aldrich had jurisdiction to grant the order of sale *at chambers*. This question must be determined by reference to the statute law. Section 2115 of the General Statutes reads as follows: "The judges of the Courts of Common Pleas shall have power at chambers to grant writs of prohibition and mandamus, and to hear and determine motions to set aside or stay executions, in the same manner, in every respect, as if the court was actually sitting; and with the consent of all adult parties in a cause, and of the guardians *ad litem* of infants therein, to hear and determine any matter not properly triable before a jury; and the parties respectively shall have the same right of appeal as if the decision was made in open court.

*"They may hear and determine actions for partition, and may grant all writs and processes in such actions at chambers, in the like manner and with the same effect as are now granted in term time."*



It will be observed that in this section power is conferred upon a Circuit Judge at chambers to exercise several specified powers: 1st. To grant the writs named, to which the writ of *certiorari* has been added by an amendment to this section, passed in December, 1882, 18 *Stat.*, 38. 2nd. To hear and determine motions to set aside or stay executions. 3rd. *With the consent of the parties*, to hear and determine any matter not properly triable before a jury. 4th. To hear and determine actions for partition. The precise question presented by this appeal is, whether the consent of the parties is necessary to enable a Circuit Judge to hear and determine an action for partition. It seems to be pretty clear that no such consent is necessary to the exercise of the two first powers, inasmuch as no such qualification is mentioned when those powers are conferred, and it seems to be equally clear that consent is necessary to the exercise of the third power, inasmuch as such a qualification is expressly mentioned when that power is conferred. But when the fourth power—that herein brought in question—is conferred, we find no such qualification expressed, and, on the contrary, it is conferred in terms as absolute and unqualified as those which were employed in conferring the first and second powers. We do not, therefore, see any warrant for interpolating any qualification in the exercise of a power which the legislature has seen fit to confer in unqualified terms.

In addition to this we find in the section of the general statutes the words which we have italicized above, by which the power here under consideration was conferred, are placed in a separate paragraph from the previous part of the section where one of the powers conferred is subject to the qualification that the consent of parties shall be obtained; and the only word in the paragraph which we have italicized which refers, or in any way relates to what has gone before is the word “they,” which, of course, only relates to the officers previously spoken of—the judges of the Court of Common Pleas—and not to the powers conferred upon such officers. Now if, in the preceding paragraph, *all* the powers conferred had been conferred with the qualification contended for, there might be better reason for saying that such qualification must be annexed to the power

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conferred in the additional paragraph, but such is not the fact. It is true that when this section was amended by the act of 1882, above referred to, and the section repeated with the amendment inserted at its appropriate place, we do not find it divided into two paragraphs, as it is in the general statutes, yet as the sole object of this amendment manifestly was simply to add the writ of *certiorari* to those mentioned in the section as it was originally adopted, we do not think the circumstance that the section as it appears in the amendatory act, is not divided into paragraphs is entitled to any consideration.

But what is much more important, as was well argued by counsel for respondent, if the view contended for by appellant should prevail, then the second paragraph of the section as originally adopted, was wholly unnecessary. For the third power conferred in the first paragraph—"to hear and determine any matter not properly triable before a jury"—would, by its terms, embrace the power to hear and determine an action for partition, as that unquestionably is a matter "not properly triable before a jury," and hence there would have been no necessity to add another paragraph conferring the same power in express terms, and the only reason for doing so must have been to confer that specific power without the qualification—consent of parties—which had been annexed to the general class of powers, under which the one here brought in question would fall. For there can be no doubt that under the third power conferred in the first paragraph of the section, a judge at chambers would have jurisdiction to hear and determine an action for partition, *with the consent of the parties*, as it would unquestionably be a matter "not properly triable before a jury," and if so, where would be the necessity for conferring such a power, in an additional paragraph, without any such qualification annexed, unless it be for the purpose of declaring that the power so specifically conferred might be exercised without the consent of the parties?

It is argued that the view which we have adopted would lead to the conclusion, that a judge at chambers in the County of Sumter might hear a case for the partition of land in Georgetown, inasmuch as section 2115 contains no limitation upon his powers. But such limitation may be found in section 144 of the Code,

which requires that actions for the partition of real property must be heard in the county where the land or some part thereof is situated. For although the Court of Common Pleas has general jurisdiction to hear and determine all actions for partition of real property, yet the section of the code just cited limits the exercise of such jurisdiction to the court while sitting for the county where such land or a portion of it lies. And we do not see why, in the same way, it may not be said that while the power conferred upon a judge at chambers to hear and determine actions for partition by section 2115 of the General Statutes does not appear to be limited by the terms of that section, yet it is limited by section 144 of the Code, so that it can only be exercised in the county where the land or some portion of it lies. In this case it appears that Judge Aldrich, when he granted the order here in question, was sitting at chambers in Georgetown County, where the land lies.

It seems to us, therefore, that Judge Aldrich had jurisdiction to grant the order of sale here brought in question. This order having been granted prior to the passage of the act of December, 1885 (19 *Stat.*, 314), we have not undertaken to consider what effect, if any, that act may have had upon the section of the general statutes herein construed.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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BULWINKLE & CO. v. CRAMER & BLOHME.

1. Where defendants in their own name sold corn at a sound price, took a note therefor in their own names and realized thereon and the corn proved to be unsound, in action by the plaintiffs (who had paid this note to an innocent endorsee) to recover their damages, parol testimony is inadmissible in behalf of defendants to show that they were acting, in this sale, as agents for third persons.
2. The rule that parol testimony is inadmissible to vary or explain written instruments, and the exceptions to that rule, fully considered and applied.
3. C signed and delivered to B a written paper as follows: "May 17th.

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Sold B 5,000 bu. mixed sacked corn @  $71\frac{1}{2}$  c. Schooner shipment payable on arrival. No wharfage." *Held*, a complete contract, although signed by only one of the parties, and that parol testimony was inadmissible to show that C was acting only as agent.

Before KERSHAW, J., Charleston, November, 1886.

The opinion states the case.

*Messrs. Hayne & Ficken*, for appellant.

*Messrs. Simons & Cappelmann*, contra.

October 14, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This was an action against the defendants, "Cramer & Blohme," for \$1,138.70, damages sustained upon a lot of shelled corn in sacks, purchased from them by the plaintiffs on May 17, 1884. The following writing was offered as the written contract of the parties:

"May 17th. Sold H. Bulwinkle & Co.—

"5,000 bu. mixed sacked corn @  $71\frac{1}{2}$  c.

"1,000 " " " @  $80\frac{1}{2}$  c.

"Schooner shipment payable on arrival. No wharfage.

"(Signed)

CRAMER & BLOHME."

At the time the purchase was made the corn was not in the city, but soon after, about the last of May or first of June, the schooner "May Williams" reached Charleston with the corn. Upon its arrival in the harbor, the plaintiffs were notified of the fact. Mr. Haesloop, one of the plaintiffs, went down to the vessel and finding about 150 sacks out, examined the corn in two or three of them, and found that "it seemed good." On June 4, before all the corn was out of the vessel, the defendants presented their account for the corn, \$4,400.45. The odd cents were paid and the plaintiffs gave their note as follows:

"\$4,400.

CHARLESTON, S. C., June 4, 1884.

"Forty days after date, we promise to pay to the order of Cramer & Blohme, forty-four hundred dollars at any city bank. Value received. Due July 19-22.

"H. BULWINKLE & Co."

Endorsed as follows :

Pay A. Bequest without recourse.

CRAMER & BLOHME,  
A. BEQUEST.

Written across the face, "Paid July 22, 1884."

A few days after the note was given, in removing the corn it was discovered that some of the sacks were damaged. Immediate notice was given to the defendants, but as they refused to correct the matter or to have anything to do with it, the corn was "surveyed" by two gentlemen, at the request of the "Merchants' Exchange," and 1,470 sacks were found to contain corn in "a damp blue-eyed and musty condition." This damaged corn was sold at auction and brought less than the price of good corn of the same kind, by \$1,138.70. In the meantime, and before the note fell due, the defendants transferred it, and as the defence of unsoundness of the corn could not be made to it, in the hands of an innocent holder before due, the plaintiffs paid it and brought this action for the damages sustained.

The cause came on for trial before Judge Kershaw and a jury. A witness, one of the defendants, was asked whether they (the defendants) contracted in their individual capacity, or in what capacity. The plaintiffs objected to the question, claiming that parol testimony could not be offered to alter the written contract. The judge admitted the parol evidence, saying: "I do not regard this paper, which is a mere memorandum of contract taken down at the time, as precluding testimony as to the conversation between the parties, which might in any way throw light on the contract they were making. If these parties knew from any source at the time that the paper was made, that they were actually dealing with the defendants as agents, I think it can be shown as part of the *res gestae*," &c. The testimony being admitted, the jury, under the charge of the judge, found for the defendants. The plaintiffs appeal upon the following exceptions:

"1. That his honor committed error in ruling that the paper or contract sued on was a mere memorandum of contract, and did not preclude testimony as to conversations between the parties which might, in any way throw light on the contract or the nature of the contract they were making. And that if the

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plaintiffs knew from any source, at the time that paper was made, that they were dealing with the defendants as agents, it could be shown as part of the *res gestae*.

"2. Because his honor ruled that if in this case there was a clear understanding between the parties that defendants were acting as agents, such understanding was not excluded by that paper.

"3. Because his honor admitted parol evidence on behalf of defendants, after objection thereto, as to conversations between the parties tending to throw light on the contract, or nature of the contract they were making.

"4. Because his honor admitted parol testimony on behalf of defendants, tending to show that defendants were dealing as agents and not as principals in signing the written contract sued on by plaintiffs.

"5. Because his honor admitted parol testimony on behalf of defendants, tending to show in what character defendants were contracting, whether as agents or principals, when they signed the contract or writing sued on and put in evidence by plaintiffs.

"6. Because his honor erred in instructing the jury as follows: 'If the jury find that the defendants, or either of them, signed the written contract offered in evidence by the plaintiffs, they are personally bound by said contract, unless it was distinctly understood by both parties, that the defendants were not to be personally liable for defects in the article purchased.'"

We agree with the Circuit Judge that in this State as to personal property, the rule of law is, that "sound price requires sound property," and the contract for the corn must be read as if these words were added "corn warranted to be sound." A part of the corn turned out to be "unsound," and it would seem that the plaintiffs are entitled to redress on the warranty, unless they, in some way, waived their rights. Something was said in the case about the plaintiffs having accepted the corn for themselves after an examination, but as there is no reference to that subject in the exceptions, the matter, of course, is not now before us.

As we understand it, the sole question in the case is, as to who is liable—whether the defendants, who sold the corn, signed the agreement, and took the note of plaintiffs and realized upon it in

their own name, had the right at the trial, to introduce parol testimony tending to show that they were not acting as principals, but as agents of Robert Turner & Son, of Baltimore, and the contract of plaintiffs having been made with Turner & Son through them, they are not liable individually. The question as to the admissibility of the evidence, seems to have been considered in two aspects: First, whether the paper offered as the agreement was such a contract in writing as to be within the rule which excludes parol testimony, and if so: Second, whether the judge erred in charging the jury, "that the defendants were not liable if it was distinctly understood by both parties, that the defendants were not to be personally liable for defects in the article sold."

All the authorities agree that as a general and most inflexible rule of evidence, "Whenever written instruments are appointed, either by the requirements of the law or by the compact of parties, to be the depositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy." *Starkie on Evidence*, 648. This seems very plain, but the application of the rule is not always free from difficulty. In the infinite combination of circumstances, cases arise, which seem exceptions, but, when clearly examined, are found not to fall within the principle. As for example, it may happen that the written instrument does not purport to cover the whole field of contract, and is not intended to be the "depository" of the whole agreement, but only one branch of it. In such case, the whole contract may be proved by parol without touching the principle—the object being not to add to or alter the written instrument, but to show the whole agreement, of which the writing is only a part. *Kaphan v. Ryan* (16 S. C., 360), is an example of this class, where the court were "not called on to give construction to the note and mortgage, but to determine from the evidence, for what purpose they (as executed) were to be used," &c. Here the writing covers the whole field—stating who are the parties and what the consideration and the price, in condensed form, but with exhaustive particularity.

Sometimes the "written instrument" does not state specifically

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the consideration, as where a note says generally "for value received." There is a class of such cases, where the consideration may be enquired into; and in that way matter may get in by parol, "which does not necessarily tend to change the terms of the note, although by showing the true consideration upon which it was given, it may control the recovery upon the note." See *McGrath & Byrum v. Barnes* (13 S. C., 332), where the court reviewed our cases upon the subject, and the former Chief Justice (Willard) endeavored to reconcile them, on the distinction here indicated. In that case it was held that, "When an executor gave his promissory note for the payment of money, which was expressed to be the amount due by his testator's estate for medical services rendered, most of which during last illness, parol evidence of a contemporaneous agreement, that the note was to be paid only upon a certain condition (that the probate judge would pass the account) is incompetent." In the case before us there cannot be the slightest doubt that the consideration was as stated in the instrument.

There is no doubt that a mere receipt, although in writing, may be explained by parol; but that goes on the ground that a receipt does not necessarily import a contract. As was stated in the case of *Heath v. Steele* (9 S. C., 92), "In itself a receipt does not express the terms of any contract or writing of the minds of the parties, between whom it passes, but merely evidences, by way of admission, the fact stated in it." See *Moffatt v. Hardin*, 22 S. C.; 1 *Greenleaf*, section 305.

But assuming that this case does not come within any of the seeming exceptions above indicated, it is urged that the paper was too informal and *ex parte* to amount to a contract, but must be considered as a "mere memorandum of a contract," and therefore, not such "a written instrument" as to come within the rule as to the exclusion of parol evidence. Most assuredly a simple bill of parcels is not a contract, for the very good reason that it lacks the essential element of agreement, being only the statement of a fact—a memorandum—"a note to help the memory"; as, for instance, the bill for the price of the corn rendered in this case was a mere memorandum. But a contract is a promise from one to another, either made in fact or created by the law,



to do or to refrain from doing some lawful thing. *Bishop on Contracts*, section 1. There is no particular form required, the only requirement being, that it must contain the contract of the parties, and be definite and free from ambiguity. We can well understand how, in the hurry of business, parties would substitute condensed forms for regularly drawn out covenants or agreements. The defendants were offering corn for sale, to come by a vessel, the plaintiffs agreed to purchase a lot, and the defendants committed the agreement to writing thus: "May 17. Sold to H. Bulwinkle & Co. (\* \* \* corn, &c.) Schooner shipment, payable on arrival. (Signed) Cramer & Blohme." Why was that not a complete contract? It is said the plaintiffs did not sign it. The whole case shows that it was not *ex parte*, but expressed the contract of both parties. We think it is not unusual in a certain class of agreements, to be signed only by one party; as in the case of an ordinary note, the terms of which are binding upon both parties. Suppose the defendants had offered the corn for sale at public auction, and upon a lot being purchased by the plaintiffs at a certain price, the defendants had made upon their sale-book the same entry precisely as they made in this case, "Sold, &c., to Bulwinkle & Co.," would they not be liable upon it as their contract? The research of the plaintiffs' attorney enabled him to furnish the court with references to several cases, which seem to conclude this.

In *Meyer v. Everth* (4 *Camp.*, 22), the action was on a contract in these words: "50 hogsheads of Hambro's sugar loaves at 155 s., free on board of a British ship. Acceptance at 70 days." Lord Ellenborough held that it was a contract, and refused to admit parol testimony, tending to show that when the sugar was purchased a sample was exhibited, saying, "When the sale note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would amount to an admission of parol evidence to contradict a written document," &c.

In *Powell v. Edmunds* (12 *East.*, 10), the action was on a sale note in these words: "April, 1806. I agree to become the purchaser of lot the first (timber trees) at £700 and agree to fulfil the conditions of sale. (Signed) A. Edmunds." At the trial an effort was made to show, by parol testimony, a warrant

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as to quantity by the auctioneer, but the evidence was rejected, the court saying: "There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol testimony were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreements, which would be setting aside all written contracts, and rendering them of no effect," &c.

In *Smith v. Jeffryes* (15 *Mees. & W.*, 560), the terms were, "I hereby agree to sell Mr. Smith, of Tanner Hill Deptford, sixty tons of Ware potatoes, at F5 per ton, and for which he has given me a bill for F250 for three months, and is to give F50 cash on Friday next. (Signed) Samuel Jeffryes." It appeared that in the neighborhood three qualities of potatoes were known as Wares, and the effort was to show by parol that the contract was for a particular kind of Wares. Held, "that the evidence ought not to have been received. It went to vary and limit the contract between the parties."

In *Greaves v. Ashlin* (3 *Camp.*, 426), the words were, "Sold to John Greaves 50 quarters of oats, at 45 s. 6 d. per quarter, out of 175 quarters. (Signed) I. Stevenson, for I. Ashlin." The defendant attempted to prove that his agent, Stevenson, had verbally made it a condition of sale that the plaintiff should take away the oats immediately, and had abated 6 d. per quarter of the price originally offered, in expectation of his agreeing to do so. The court held that "it was not competent to the defendant to give such evidence, as it materially varied the contract, which had been reduced into writing." In each of the two last cases cited, the paper was signed only by one of the contracting parties, and the action was brought by the party who had not signed it. See also *McClanaghan v. Hine*, 2 *Strob.*, 122, and *Gibson v. Watts*, 1 *McCord Ch.*, 490.

We think the paper proved in this case, was a contract in writing of both parties, within the rule as to the exclusion of parol evidence.

But it is insisted that while this may be so, as to what may be called the terms of the paper—the quality of the article, con-

sideration, time of payment, &c., yet parol testimony was admissible, tending to show that the defendants, Cramer & Blohme, in selling the corn—committing the agreement to writing—taking the note and realizing upon it in their own name—were acting, not as the papers represented, but as agents of a house in Baltimore, and that the plaintiffs contracted with said house, through Cramer & Blohme, as their agents. Is not the signature to a contract in writing, showing who made it and in what character, a part, and a very important part, of that contract? We are unable to see any good reason, why this part should not be protected from alteration or addition, as well as any other part of the contract in writing. It seems to us that, when the defendants signed the contract in their own names, that became a part of it, and could not be altered by parol, so as to add to the signature “as agents of Robert Turner & Son, of Baltimore.” “A person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name. \* \* \* If an agent selling goods as bought of him the agent, he would be personally liable for a failure to deliver the goods.” *Story Agency*, 269. See also, section 219; *Benj. Sales*, section 219; *Higgins v. Senior*, 8 *Mees. & W.*, 834; *Nash v. Towne*, 5 *Wall.*, 703, and *Jones v. Littledale*, 6 *Adol. & E.*, 486, in which last case cited Lord Chief Justice Denman said: “There is no doubt that evidence is admissible on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so fix the real principal; but it is clear that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the statute of frauds until the invoice, by which the defendants represent themselves to be the sellers; and we think, they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals, but in so doing they have made themselves responsible,” &c.

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In the case from Wallace, Mr. Justice Clifford said: "Parol evidence can never be admitted for the purpose of exonerating an agent, who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. Where a simple contract other than a bill or note is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another, and that principle has been fully adopted by this court."—Citing numerous authorities.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the cause remanded to the Circuit Court for a new trial.

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CHARLOTTE, COLUMBIA & AUGUSTA R. R. COMPANY v.  
GIBBES, TREASURER.

1. Under the 41st section of the Act of 1841 (11 *Stat.*, 168, now section 1361 of the General Statutes), every charter thereafter granted, amended, or renewed, was subject to amendment, alteration, or repeal, unless specially excepted from this provision by the act of incorporation or amendment; and under the constitution of 1868 (art. XII., § 1), "corporations may be formed under general laws, but all such laws may from time to time be altered or repealed." Prior to 1868 two railroad corporations were chartered, both of which were excepted from the operation of the 41st section of the Act of 1841, but by an act passed in 1869, containing no such exception, these two corporations were consolidated into one. *Held*, that the charter of this consolidated company was subject to amendment by the legislature.
2. Where a railroad company holds its charter subject to legislative amendment, an act requiring such company to pay into the State treasury an assessment of money towards defraying the expenses of a com-

mission appointed by the State to supervise railroads, is, in effect, an amendment of such charter, and therefore is legal, valid, and binding on the company.

3. Has a corporation the rights guaranteed by the constitution to natural persons?
4. The assessment upon a railroad company to pay the expenses of a railroad commission, based upon the gross income of the company, is not a tax upon property, but is in the nature of a license tax upon the business of railroad companies.

MR. JUSTICE MCGOWAN concurred in the result, and MR. JUSTICE MCIVER dissented.

Before FRASER, J., Richland, April, 1886.

The appeal came to this court from the following Circuit decree :

This case was heard by me at the term of the court held in March and April, 1886. As the case will be the subject of consideration in another court for the purpose of settling important questions involved, I will confine myself to a brief statement of the facts and the reasons for the conclusions reached by me.

The plaintiff, a corporation under the laws of this State, was charged on the books of the county treasurer, for the fiscal year 1883, with the sum of nine hundred and eighty-seven 75-100 dollars, as plaintiff's proportion, according to gross income, of the salary and expenses of the railroad commissioners. This amount is by law collectible in the same manner as taxes, and has been paid under protest. This action has been brought to have this assessment declared illegal, and thereby to enable plaintiff to recover back the amount so paid.

In the case of *The Columbia & Greenville Railroad Company v. Wade Hampton Gibbes, as Treasurer of Richland County*, 24 S. C., 60, the Supreme Court held that the assessment was valid. The general provisions of the railroad commissioners' act were enacted in 1879, and, therefore, were in force when the corporation in that case was organized under the general law then in force. It was held by the Supreme Court that the assessment was legal and valid, because the law under which the assessment was made was in force when the corporation was formed, and, therefore, one of the conditions of its existence. This conclu-

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sion of the Supreme Court must have been reached on the assumption that this was one of the conditions which the legislature had a right to impose on new corporations, either under the power to levy taxes, or some other power which the constitution gives to the legislature.

In the case now before the court, the corporation was in existence when the general provisions of the railroad commissioners' act became law in 1879. By the act of March, 1869, the Charlotte & South Carolina Railroad Company and the Columbia & Augusta Railroad Company were consolidated, and with some slight modifications all the rights, powers, and privileges of these two companies were conferred on the plaintiff corporation under its present name. This consolidation act worked a dissolution of the old corporations and created one entirely new, and deriving all its powers, rights, and privileges from the consolidation act. This act contained no provision excepting this corporation from the act of 1841, now section 1361 of the General Statutes. The charter, therefore, became subject to "amendment, alteration, or repeal by the legislature, at its will." *Shields v. Ohio*, 95 U. S., 319; 15 Wall., 454.

It is claimed that this assessment is an unconstitutional tax, and cannot be imposed on an existing corporation under this power to amend, alter, or repeal. I take it to be law that the legislature has no power in granting a charter to a corporation to exempt its property from the liability to equal assessment and taxation ordained by the constitution of 1868. The property of every corporation, as that of natural persons, is bound for its equal share of the taxes, and no more can be imposed.

Article IX., sec. 1, Constitution of 1868, requires "a uniform and equal rate of taxation," and art. XII., sec. 2, makes corporations "now existing or hereafter created," "subject to taxation." If the property of corporations is under the control of the constitution, and cannot be exempted from taxation, it seems to follow that the constitution protects it from any greater taxation than is imposed on other property. If the constitution controls for one purpose, it does for the other. Corporations "hereafter created" cannot be subjected to any greater taxation than those "then existing," all of which are liable only to the equal taxation.

If this be the correct view, then there could have been in the mind of the Supreme Court nothing in this assessment in itself obnoxious to these constitutional provisions, or the mere fact that the assessment was in pursuance of an act passed before the corporation was created could not have made it valid as one of the conditions of the charter. In other words, the legislature has no right to exempt any corporation then existing, or at the time of its formation, or afterwards to be created, from its liability to taxes, or to impose on them more than an equal share. If the fact that the validity of this assessment depended upon the fact that it was one of the conditions of the charter itself, then the liability would have been avoided if, instead of forming a new company, the private individuals who bought all the franchises of the old Greenville & Columbia Railroad Company had held and operated the road as private and natural persons and without the formation of the new company.

I infer, therefore, that in the case of the *C. & G. R. R. Co. v. Gibbs*, *supra*, the court would not have held the assessment valid even if the corporation was formed after the passage of the railroad commissioners' act, unless in the opinion of the court the assessment was free from constitutional limitations in reference to taxes, and within the range of those requirements which the legislature had a right to impose by way of amendment, alteration, or repeal, or which it had a right to enact as to future or even existing corporations by virtue of the police power. The struggle between corporations and the law-making power has been unrelenting ever since the Dartmouth College case settled the question in favor of corporations that they were not subject to legislative will in this country as in England, but were protected from all interference under the constitutional provisions in reference to the inviolability of contracts. The general practice since then has been to reserve, as has been done in this case, the power to amend, alter, or repeal. While the extent of this power is still not clearly defined, it has been freely exercised and liberally construed.

Besides this reserved power of amendment, there is the "police power," "an inalienable attribute of sovereignty applicable to all corporations and persons alike, of which no State can by its leg-

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islature divest itself." By this power "persons and property are subjected to all kinds of restraints and burdens." *Thorp v. R. R. Co.*, 27 *Vt.*, 140. Art. XIV., sec. 1, of the Constitution of the United States cannot, in my opinion, be construed either to interfere with this reserved power to amend, alter, or repeal charters, or to cut down the police power of the States. Under, perhaps, the joint operation of the power to amend and the police power of control, railroad companies have been compelled to submit to legislative control of rates of freight and fare of passengers. They have been compelled to expend material, labor, and money in fencing their tracks for the purpose of protecting stock from harm and their trains from accidents involving the safety and lives of the travelling public. The railroad commissioners have a function of the same kind, perhaps intended for a more extensive and thorough control of the operations of the railroads in their relations to the public. They are the great public highways for commerce and travel, established not only for the benefit of shareholders, but for the public benefit. *Munn v. Illinois*, 94 *U. S.*, 130. Is there any difference between making a litigant in court pay for the service of public officers rendered against his will and against his interest, and making the railroad companies pay for the services rendered in and about regulating the complicated and conflicting claims of themselves and the public?

I therefore conclude that this assessment is not in violation of any provision of the constitution of 1868 in reference to taxation of property, or of the constitution of the United States; that the full power to amend the charter of the plaintiff has been reserved; that the subjection to the provisions of the railroad commissioners' act in common with other corporations is within the reserved power to amend; and that the said act is also within the police power, if not within the power to amend.

I would prefer to have more decided convictions in a case of the importance of the one now under consideration, but I feel bound to resolve any doubts I may have in favor of the act of the legislature, satisfied that there is another tribunal which will correct any error I may make. It is therefore ordered and adjudged, that the complaint be dismissed with costs.

The plaintiff appealed upon the following exceptions :



I. For that his honor held that the decision of the Supreme Court of this State in the case of *The Columbia & Greenville Railroad Company v. The Treasurer of Richland County* was, by implication, applicable to this case.

II. For that his honor held that the assessment of taxes complained of was a proper enforcement of the police power of a State for the control of railroads.

III. For that his honor held that the act of March, 1869, consolidating *The Charlotte & South Carolina Railroad Company* and *The Columbia & Augusta Railroad Company*, had the effect of working a dissolution of the original corporations; and that thereby the charter of the new corporation became subject to "amendment, alteration, or repeal by the legislature at its will."

IV. For that his honor held that the assessment of taxes complained of was not in violation of section 1, of article XIV., of the Constitution of the United States.

V. For that his honor held that the imposition of the taxes complained of was not in violation of the requirements of the constitution of the State of South Carolina, that there should be a uniform and equal rate of taxation upon all property.

VI. For that his honor did not hold that the assessment and collection of taxes complained of were in violation of one or more of sections 12, 14, 23, and 36, of article I., and section 1, of article IX., of the Constitution of South Carolina; and,

VII. For that his honor did not hold that the collection of the taxes complained of was wrongful or illegal.

*Messrs. J. C. Haskell and H. N. Obear*, for appellant.

*Mr. Earle*, Attorney General, and *Mr. C. R. Miles*, contra.

October 18, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. Section 1453 of the General Statutes imposes liability in certain proportions upon the railroad companies of this State for the salaries of the officers known as railroad commissioners. The appellant denies the constitutionality of this act, and claims exemption therefrom on that ground.

The appellant was brought into existence under its present

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name in 1869 by the consolidation of two other companies previously chartered and in operation at that time as separate companies. This consolidation was made by virtue of the act of March, 1869. The two original companies which, by consolidation, made the appellant company, it is conceded, were not subject to the 41st section of the act of 1841, whereby the power to alter, amend, &c., certain charters granted by the legislature was reserved; on the contrary, said companies were expressly excepted from the operation of said section, thus giving them vested rights which could not have been interfered with by any subsequent legislation had they remained separate and distinct, and continuing to exercise the rights and powers conferred upon them in the original charters. *Dartmouth College Case*. The consolidation, however, in 1869, dissolved the two original companies and created an entirely new company—the appellant—with rights and privileges not dependent or derived from the charters of the original companies, but upon the act authorizing the consolidation and the law governing corporations at the time.

Now, at the time of this consolidation the constitution of 1868, and the act of 1841, in reference to corporations, were of force. The constitution (art. XII., section 1) declares “that corporations may be formed under general laws, but all such laws may from time to time be altered and repealed.” And further: “That the legislature shall regulate the public use of all franchises, and limit tolls, imposts, and other charges and demands under such laws.” Sec. 5. The act of 1841 provided in section 41, “That it shall be deemed a part of the charter of every corporation created under the provisions of any general laws, and of every charter granted, renewed, or amended by act or joint resolution of the general assembly (unless such act or joint resolution shall, in express terms, declare the contrary), that such charter, and every amendment thereof, should always remain subject to amendment, alteration, or repeal by the general assembly.” Act of 1841, 11 *Stat.*, 168, now section 1361, General Statutes.

It is hardly necessary to discuss the question whether the appellant company, having been brought into existence in 1869, since the adoption of the constitution of 1868, and while the act of 1841, *supra*, was of force, is subject to amendment, altera-

tion, and repeal at the discretion of the legislature, there being no exemption from section 41 of the act of 1841 in the act under which the consolidation took place. The case of *Hoge v. The Railroad Company* (99 U. S., 348) is full to this point, where the act of 1841 was construed, and where the court said: "Every charter amended or modified was subject to repeal, amendment, or modification. Such is evidently the meaning of the 41st section of that law, though the intention is inaptly expressed; and if an exemption from further legislative control had been originally acquired by the company, it ceased when the amendment to the charter was obtained." If such is the effect of a mere amendment, surely a consolidation of two companies into one, as was had here, thereby creating an entirely new company and destroying the others (*Shields v. Ohio*, 95 U. S., 319), would bring the new company under the legislative control of the act of 1841, whatever may have been the vested rights of the previous companies.

It is perfectly clear, then, that the appellant company cannot successfully claim exemption from legislative control by virtue of any rights derived from its charter. Nor can it deny that the general assembly has general power to amend, alter, or repeal said charter, as provided in section 41 of the act of 1841, and in the article XII., section 1, of the Constitution of 1868. This was the contract under which said company was created, and it is bound thereby. In fact, the rights of all corporations are founded in contract, which must be construed and enforced as all other contracts, to wit, according to the intent of the parties. It was upon this theory that the great Dartmouth College Case was decided. There being no reservation of power applicable to that case, either in the charter itself, or in any general law upon the subject, the court was compelled to hold that the rights of the college, as specified in the charter, were matters of contract, and were therefore inviolate, and could not be assailed or impaired in any way by subsequent legislation.

It has been upon this theory, too, that many cases have since decided that where a corporation accepts a charter under a general law, or under a provision of the constitution of the State reserving control over all corporations created therein, or under

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a special provision of the charter itself to that effect, it is subject to such control, and may be amended and altered, as in the judgment of the general assembly the public interests may demand. See *Black on Constitutional Prohibition*, sections 33, 34, *et seq.*, and the cases there cited. And it was upon this theory also that the recent case of the *Columbia & Greenville R. R. Co. v. W. H. Gibbes* (24 S. C., 60) was decided, in which the constitutionality of the act now under consideration was sustained as to said company—this court holding that said company having organized since said act was passed, had thereby contracted with reference thereto, and was bound by its provisions as a part of the act of incorporation. And it is upon this theory that the appellant here must be held bound. In fact, we can see little or no difference in the principle which controlled the court in that case and the one which must be applied here. It is true, that the Columbia & Greenville R. R. Company accepted its charter after the general railroad law of 1878 had been enacted, and thereby incorporated its provisions into its charter as a part and parcel thereof, but what is the difference in principle in accepting a charter with certain stipulations therein, and in accepting one with a consent and an agreement, that the legislature granting said charter may insert such stipulations afterwards, if in its discretion it sees proper to do so? They both rest upon contract, and both may be enforced under the general law of contracts.

According to this view, if the act complained of, and which has imposed a liability upon the appellant to pay its proportion of the railroad commissioners' salary, is a legitimate amendment under the act of 1841 and the constitution, then it can make no difference what it may be called—whether a tax for revenue, a police regulation, or a license fee. Whatever it may be, the company has contracted to pay it; and if it claims the privileges and rights of its charter, it must take them with the burdens imposed. It cannot enjoy the one and repudiate the other. So that it follows that the only question in the case is, has the general assembly in reference to the appellant transcended its power to alter, amend, and repeal the charters of corporations reserved in the constitution and the act of 1841, section 1361, of the General Statutes?

There is no doubt but that the appellant received its existence with full knowledge that this reserved power hung over it—a power which, at least so far as the terms of the reservation are concerned, was unlimited as to alteration, amendment, and repeal. And the question now is not whether such power exists, but whether the act in question has gone beyond it. We think this has been settled in the recent case of the Columbia & Greenville R. R. Company, *supra*. There the same act was in controversy and the same question raised and based very much upon the same ground. The court held, in substance, that the act was a part of the charter, inasmuch as the charter was granted and accepted after the passage of the act. If, then, the legislature could incorporate into the charter the provisions of the act imposing the liability complained of at the beginning, without violating the sections of the constitution relied on here as to taxation, &c., why could it not do so after the organization of the company as well, the reservation of power to amend, &c., having prevented the vesting of rights beyond the reach of such amendment? The ground upon which we held that this could be done in the Greenville & Columbia case, was the consent of the company, thereby waiving all objection, constitutional or otherwise.

So here the appellant contracted to take its existence under an unlimited power in the legislature to alter, amend, and repeal. And it is too late now to complain. *Consensus facit jus*. It may be said, however, that this consent was given under the protection of the constitutional provisions invoked, and therefore it was never understood or agreed that these guarantees of the constitution, as to the rights mentioned, should be violated; but that this reserved power of amendment referred to the ordinary amendments, &c., such as would not affect the substantial rights conferred. The power reserved is very broad, according to the terms of the act. It covers the whole subject, “amendment, alteration, and appeal,” and there certainly is no limitation in the language used. Nor do we know where to fix the boundary, except it should not go beyond the ends to be accomplished or intended to be subserved by the reservation, which no doubt was regulation, control, and supervision, to the end that public interests might be protected as well as that of the corporations. We

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do not see that the act in question transcends this boundary ; on the contrary, it seems to be within it.

The constitutional guarantees invoked were primarily, at least, for the protection of natural citizens—those who had rights before the constitution was adopted, over and above it, and for the protection of which government was instituted ; and the builders of the government fearing to give it unlimited power, inserted in the constitution, the organic law of the government, certain guarantees as a bill of rights. A corporation, however, differs in many respects from a natural citizen. It has no natural existence or natural rights. It is a creature of the government, and by the act of government. It has life, if life at all, as a matter of grace, and can demand nothing. It is emphatically clay in the hands of the potter, and must take its life at the will of the government, or not at all. “Hath not the potter power over the clay?” Besides, it can protect itself if it sees proper by simply refusing to enter into the contract proposed, or, if after having once accepted, by throwing up its charter if the subsequent burden imposed proves too onerous.

From our view of this case it is wholly unnecessary to follow the counsel into their able and interesting argument on the subjects of taxation, police regulations, and licenses, because, whether this assessment on the appellant is made and collected as the one or the other, it is yet made because the appellant has consented and contracted to pay it, in consideration of life and separate existence and large privileges granted ; and if it claims these, it must submit to and abide the contract in its entirety.

But conceding that a corporation has the same right to invoke the sections of the constitution referred to, as a natural person would have, and to the same extent, does the act in question under that view violate said sections ? These sections are found in art. I., section 36, and article IX., section 1. The first declares that taxation upon property shall be *ad valorem*, and the second, that it shall be uniform. Does the act impose a tax on property, and is it objectionable because not “uniform” ? It is clearly not a tax on property assessed according to its value. It is a declaration in substance by the legislature that railroad companies may pursue their business upon condition that they shall

pay each a proportion of the salary of the railroad commissioners, the proportion being fixed by a uniform rule applied to each. It is, therefore, more in the nature of a license fee. It is true that the amount collected is to go into the public treasury, and it is collected as a tax; but it is intended to reimburse the State for these salaries paid by the State to the commissioners, who are, to some extent, officials of said companies, or at least whose duties appertain to said companies, and not to the general public; and it therefore may be properly styled a license tax, collected and appropriated for the proper regulation and benefit of the corporations paying it. And being assessed upon all railroad corporations alike, it is "uniform," in accordance with the true meaning of the constitution.

But can a tax be imposed and collected other than upon property and according to its value? Is art. I., section 36, *supra*, exhaustive upon this subject? This question was fully and thoroughly examined and determined in *State v. Hayne*, 4 S. C., 403, the court holding, after a most elaborate review and discussion of the whole matter in all its phases, that this section was not exhaustive as to the powers of the general assembly on the subject of taxation, and while, when a tax is imposed on property (which, it is admitted, is the general subject matter for taxation), it must be assessed upon the value of the property, and not otherwise, yet that the State was not limited to property as the only basis of taxation, and in that case a tax on the profession of law in the shape of a license fee was held constitutional.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

MR. JUSTICE MCGOWAN. I concur in the result, and hope to be able to express my views in a separate opinion, but will not now delay the judgment.

MR. JUSTICE McIVER, *dissenting*. Being unable to concur in the conclusion reached by the majority of the court, I propose to indicate as briefly as practicable, without undertaking any elaborate discussion, some of the reasons which forbid such concurrence.

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In the first place it will be necessary to consider whether the question involved in this case has been concluded by the decision of this court in the recent case of the *Columbia & Greenville Railroad Company v. Gibbs*, 24 S. C., 60; for although I did not concur in the conclusion there reached, yet that decision must and should be regarded as an authoritative decision of the point there involved, entitled to be respected and obeyed by every one, and I certainly would, readily and cheerfully, yield to its authority. It does not seem to me, however, that the question now presented was decided by that case; on the contrary, as was said by the court in dismissing the petition for rehearing, "the question was necessarily limited to the corporation making it," and the court expressly declined, although urged so to do, to consider or determine the general question whether the 41st section of the act of 1882 (17 Stat., 817), now incorporated in the General Statutes as section 1453, was unconstitutional, and confined their decision, in terms, to the question whether the Columbia & Greenville Railroad Company, which (it was assumed) had accepted its charter subsequent to the passage of the original act requiring railroad companies to pay the expenses of the railroad commission, could claim such act to be unconstitutional.

As I understand it, the decision in that case was rested solely upon the ground that inasmuch as the corporation there concerned had received its charter subsequent to the passage of the act of 1878 (erroneously—probably through a clerical error or misprint—cited in the opinion as the act of 1879), it must be regarded as having accepted the terms of that act as a part of its charter, and could not therefore repudiate it as unconstitutional. This, as it seems to me, rested upon an unfounded assumption, inasmuch as the act of 1878, by which railroad corporations had been originally required to pay the expenses of the railroad commission, had been expressly repealed by the act of 1882 (17 Stat., 841), and an entirely new and different provision enacted, so that it was a mistake to assume that the exaction there complained of was made under an act which was spread upon the statute book at the time the company received its charter. For assuming, what I have no doubt is the fact, that the company was chartered in 1880, the exaction or tax there complained of,



imposed by the act of 1884, could not have been made by virtue of the act of 1878, which had then been repealed, but must-necessarily have been made by virtue of the act of 1882, which was *not* spread upon the statute book at the time the company received its charter in 1880.

But in addition to this, the provisions of the act of 1878 differed materially from those of the act of 1882, now incorporated as section 1453 of the General Statutes. By the former this exaction was not spoken of as a tax and was not collectible as such, but could only be collected by suit in the Court of Common Pleas in the name of the comptroller general for the benefit of the railroad commission; whereas in the latter it was collectible "in the manner provided by law for the collection of taxes from such corporations, and shall be paid by the said county treasurers, as collected, into the treasury of the State, in like manner as other taxes collected by them for the State." So that the law which was on the statute book at the time the Columbia & Greenville Railroad Company received its charter, purported to require all railroad corporations to pay a proportionate part of the expenses of the railroad commission, and made them liable to an action at law in case of their refusal so to do; but this law having been subsequently repealed and another enacted in its place, subsequent to the granting of the charter to that company, whereby a tax, as I understand it, was imposed upon all railroad companies to an amount sufficient to defray the expenses of the railroad commission, it did not then, and does not now, seem to me to be within the limitations of the taxing power as prescribed by the constitution. Hence I did not then, and cannot now, concur in the conclusion reached by a majority of the court.

Thus while, according to my view, the general question now presented was really involved in the former case, yet the majority seemed to think otherwise, and rested their conclusion upon another, and as I think untenable, ground, to wit, that the corporation there concerned having accepted its charter, with this provision requiring all railroad companies to pay proportionate parts of the expenses of the railroad commission, could not afterwards resist such requirement upon any ground.

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Now, while it is quite true that the legislature may, when application is made to it for a charter, either grant or refuse such application, as may be deemed best for the public welfare, yet it does not follow that they may impose *any* conditions, or insert in such grant *any* privileges or immunities, that they may see fit to do. Like all other departments of the government, the legislature is confined by the constitution to certain limits, and therefore they can only impose such conditions and confer such privileges as fall within those limits. They cannot confer upon a corporation, except such as are specified in the constitution, the privilege of total exemption from taxation, nor can they impose, as a condition of the charter, the requirement that a corporation shall pay taxes on its property at double the rate imposed upon property held by others; for in the one case as well as in the other the legislature would transcend the limits prescribed to it by the constitution.

The idea is thrown out in the opinion of the majority, though I do not understand the point to be decided, that a corporation being the mere creature of government, deriving its existence from, and holding its rights and privileges (except where protected by contract) at the will of the legislature, cannot invoke the protection of any constitutional guarantees which were inserted in the constitution for the protection of natural citizens, and were not designed to afford any protection to mere artificial persons like corporations. If this be so, it is a little singular that such a doctrine, so far as I have been able to discover, has never been advanced, much less decided, in any case. On the contrary, the reverse has been necessarily assumed in numerous cases, especially in the Supreme Court of the United States. The many cases in which corporations have successfully invoked the protection of the contract clause of the constitution, could only have been decided upon the assumption that corporations, as well as natural persons, were entitled to the protection afforded by that constitutional guaranty. So the many cases in which questions of the jurisdiction of the United States courts depending upon citizenship of the parties have been decided, all rest upon the idea that corporations, just like natural persons, may enforce their

contracts or rights of property, and are entitled to the same protection under the constitution and laws.

In the *United States v. Amedy* (11 *Wheat.*, 392), the prisoner was indicted for destroying a vessel with intent to prejudice the underwriters, who, in that case, proved to be a corporation, and it was contended that a corporation was not a person within the meaning of the act of congress, but the court held otherwise, Mr. Justice Story saying: "That corporations are in law, for civil purposes, deemed persons is unquestionable. And the citation from 2 *Inst.*, 736, establishes that they are so deemed within the purview of penal statutes." The same doctrine is fully recognized in *Beaston v. The Farmers Bank of Delaware*, 12 *Peters*, 102, and *Bank of Augusta v. Earle*, 13 *Peters*, 519. In *Santa Clara Company v. Southern Pacific Railroad Company*, 118 *U. S.*, 394, the court seemed to be so well satisfied upon the point that they declined to hear argument on the question whether the provision in the fourteenth amendment to the constitution of the United States which forbids a State from denying to any person within its jurisdiction the equal protection of the laws, applies to corporations, the Chief Justice saying: "We are all of opinion that it does."

It seems to me clear, therefore, that the plaintiff has the same right to invoke the protection of the provisions of the constitution as if it were a natural person, and the question is, whether section 1453 of the General Statutes, purporting to impose upon this company the burden of paying a proportionate part of the expenses of the railroad commission, is in violation of any of the provisions of the constitution of this State or that of the United States.

I shall assume, for the purposes of this discussion, that by reason of the consolidation of the two companies under the act of 1869, the plaintiff company subjected its charter "to amendment, alteration, or repeal by the general assembly," as provided by section 1361 of the General Statutes, though I do not understand that such would be the result under the provisions of the constitution. The provisions relied upon for that purpose are sections 1 and 2 of art. XII. of the Constitution; but section 1 applies only to corporations "formed under general laws," and

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this corporation was not so formed, but by special act; and section 2 only declares that the property of corporations shall be subject to taxation, without any reservation of the right to amend, alter, or repeal their charters. Assuming, then, that the legislature has the right to tax this company and to amend, alter, or repeal its charter, the inquiry is, whether the exaction here complained of is such a tax as the legislature has a right, under the limitations of the constitution, to impose, or is the section (1453 of the General Statutes) such an amendment, alteration, or repeal of the charter of the plaintiff as the legislature has a right to make.

The manifest object of the exaction complained of is to provide a fund for the payment of the salaries and expenses of certain officers and agencies of the State government. The salaries of the railroad commissioners are fixed by law, and are required "to be paid from the treasury of the State in (the) manner provided by law for the salary of other State officers," and they are required to "take the oath of office provided by the constitution, and the oath against duelling" (section 1451 of General Statutes as amended by the act of December 21, 1882, 18 *Stat.*, 12); and the proportion of these expenses required of each railroad corporation is required to be *assessed* by the comptroller general on each of such corporations, and the same "shall be collected by the several county treasurers, in the manner provided by law for the collection of taxes from such corporations, and shall be paid by the said county treasurers as collected into the treasury of the State, in like manner as other taxes collected by them for the State." The exaction is, therefore, made for the same purpose as *other* taxes, it is collected in the same manner, and is disposed of in like manner, as *other* taxes. It is, therefore, a part of the revenue of the State just like any other taxes; so designated and so treated by the legislature itself. If this is not so, then the exaction plainly violates section 23 of art. I. of the Constitution, which declares: "Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner, or a just compensation being made therefor."

Regarding it, then, as a tax, the next inquiry is, what kind of a tax is it? Is it a license tax, or a tax on an avocation, or rather

on the privilege of exercising an avocation, or is it a tax on property? It does not even purport to be a license tax and has none of the characteristics of such a tax. A license tax seems necessarily to involve the idea that without the payment of the tax thus imposed and the procurement of the required license it would be unlawful to pursue the avocation or carry on the business subjected to such a tax. It is a purchase of the right to carry on such a business. But there is nothing in the act now under consideration which in the remotest degree indicates that such was the intention of the legislature, and hence I do not see how it is possible to regard the exaction complained of as a license tax. But even if it could be regarded as a license tax, there would still be a question as to the constitutionality of the act by which it is imposed; for while it has been held in several cases (*State v. Hayne*, 4 S. C., 403; *State v. Columbia*, 6 Id., 1; and *Charleston v. Oliver*, 16 Id., 47), that a tax on professions or occupations is not forbidden by the constitution of the State, it does not by any means follow that the legislature has the right to single out one particular avocation, or rather, as in this case, one branch of an avocation. For the avocation of the plaintiff company is that of a common carrier, and the exaction is not required from all common carriers, leaving all other avocations and professions free from the burden of such exaction.

The fundamental principle, running through all the provisions of the constitution in reference to taxation, is that of uniformity and equality, and this principle cannot be disregarded in the imposition of taxes of any kind. Section 1 of art. IX. provides that: "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property," &c. Now, these words advance two ideas, as is well said by Willard, J., in *State v. Hayne*, *supra*, "First, equity in all taxation and assessment, and second, valuation, as the means of securing such equality in the case of taxes on property. The first clause, namely, 'the general assembly shall provide by law for a uniform and equal rate of assessment and taxation,' is not by its terms applicable alone as peculiar to taxes on property. It does not use the word value, which is significant

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to taxation as applied to property. That expression occurs in the second clause in connection with the subject to which it belongs, namely, taxation of property. These clauses are connected by the conjunction 'and,' accordingly their grammatical relations admit of their bearing [having?] independent force and effect, if the nature of the subject matter admits of it."

In other words, the language above quoted contains two separate and independent mandates to the legislature. 1st. That they shall provide by law for a uniform and equal rate of assessment and taxation of all kinds. 2nd. That they shall prescribe such regulations as shall secure a just valuation of all property. And in section 33 of art. II., there is another mandate, requiring that "all taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax." While, therefore, the legislature may impose taxes other than those on property, they can only do so by a uniform and equal rate, which, in case of property, is to be determined by the actual value thereof, as ascertained by an assessment made for that purpose. But as it seems to me clear that the exaction here complained of cannot, in any sense, be regarded as a license tax, I do not deem it necessary to pursue this branch of the discussion.

If, then, this exaction must be regarded as a tax upon the property of the plaintiff corporation, then it is quite clear that it is in violation of the provisions of the constitution for two reasons. 1st. Because it is not laid upon the value of the property, as ascertained by an appraisalment made for the purpose (*State v. Railroad Corporations*, 4 S. C., 376); and 2nd. It would be a double tax upon the same property; for it must be assumed, in the absence of any evidence to the contrary, that the officers charged with the duty of collecting the ordinary taxes from this company have performed that duty, and hence to require such company to pay this additional tax upon its property would be so plainly in violation of the provisions of the constitution as to need no further remark.

It may be contended, however, that it is not a tax upon the tangible property of the company, such as has already been subjected to the ordinary tax, but is a tax upon the franchises of

the corporation, the value of which is measured by the income derived from the exercise of such franchises. If certain franchises of corporations are property, as has been held in *Society for Savings v. Coite*, 6 Wall., 594; *Provident Institution v. Massachusetts*, *Ibid.*, 611; and *Hamilton Company v. Massachusetts*, *Ibid.*, 632; and if they are the subject of mortgage and sale, as held in *New Orleans, &c., R. R. Company v. Delamore*, 114 U. S., 501, then I see no reason why such franchises may not be taxed like all other property, provided their actual value has been ascertained by an assessment made for that purpose, as required by the constitution. But is this a tax upon the franchises of this corporation? It does not purport so to be, and if it did, the tax has not been laid upon the actual value of the property proposed to be taxed, as ascertained by an assessment made for that purpose—the franchises of the corporation—but it is proportioned to the gross income of the company, which is manifestly due to the tangible property used in producing such income, as well as to the intangible property, the franchises of the corporation; for it is quite certain that the franchises without the aid of the tangible property, which has already been taxed, would yield no income.

As was held in *State v. Railroad Corporations*, 4 S. C., 376, an act which requires every railroad company within the State to pay to the treasurer for the use of the State a sum of money, determined by the length of its road, is a tax upon property, and is unconstitutional and void because not laid upon the value of the property, so it seems to me that the exaction here complained of is in effect a tax upon the property of the plaintiff company, and unconstitutional because not laid upon the value of the property. But even regarding this as a tax upon the franchises of this corporation, as contradistinguished from its tangible property, and that the value of such franchises can be properly measured, and were intended to be measured by the gross income of the company, then it could only be required to pay the same rate of taxation upon the value of such property as is imposed upon all other property, and not a proportionate part of the expenses of certain officers and agencies of the government. In addition to this a tax upon the franchises of one class

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of corporations, while all other corporations are not taxed upon their franchises, would violate that fundamental principle of uniformity and equality required by the constitution.

If it should be said that this is a tax upon the income of railroad corporations, and not upon their property, either tangible or intangible, the proposition would be met by the same objection of want of uniformity, inasmuch as no other corporations or persons are subjected to such a tax.

Again, it is contended that the legislation here brought in question can be defended as an exercise of the police power. The power thus invoked is, no doubt, very extensive, and very healthful, if not absolutely necessary to every well ordered community, but its limits do not seem to be very well defined, and are, perhaps, indefinable with accuracy and precision. But I do not find that it has ever been regarded as furnishing any warrant for the imposition of taxes. I can understand how it may be resorted to as a justification for legislation regulating railroads or other public enterprises, which, otherwise, would seem to be an unwarrantable interference with private property, but I cannot understand how it can authorize the extension of the taxing power beyond the limits prescribed by the constitution. As is said by Judge Cooley, in his valuable work on Constitutional Limitations, page 577: "The maxim, *sic utere ut alienum non laedas*, is that which lies at the foundation of the power; and to whatever enactment affecting the management and business of private corporations it cannot fairly be applied, the power itself will not extend." And again that eminent author says: "Even a provision in a corporate charter, empowering the legislature to alter, modify, or repeal it, would not authorize a subsequent act which, on pretence of amendment, or of a police regulation, would have the effect to appropriate a portion of the corporate property to the public use."

In view of these principles, it seems to me too plain for argument that this legislation cannot be justified as an exercise of the police power. How the property of another is to be injured by the non payment, or protected by the payment, of the tax imposed, it is impossible to conceive. The payment of such tax is not even essential to the existence of the railroad commission;



for, as we have seen, the salaries of the commissioners are paid out of the State treasury, just like those of other State officers, and whether this tax is paid or not, they get their salaries all the same. I do not see how the maxim, *sic utere, &c.*, can "fairly be applied" to the act under consideration. There is no word in the act which indicates that its purpose was to lay any restraint whatever upon railroad corporations in the use of their property or franchises, and certainly the effect of it would not be to throw any protection around the rights of persons or property. It is simply an act requiring a particular class of tax-payers to pay the entire amount of the salaries and expenses of certain officers and agencies of the State government which it has been deemed necessary to establish for the public welfare, which amount is to be collected and paid into the State treasury in the same manner as "other taxes."

Finally, it is urged that this legislation can be justified as an amendment to the charter of the plaintiff company, which the legislature has reserved the right to make; and that the plaintiff, having accepted its charter with full knowledge of this reserved right on the part of the legislature, must be regarded as assenting to and accepting *any* amendment of its charter which the legislature might see fit subsequently to make, upon the principle *consensus facit jus*. Conceding that, by virtue of section 1361 of the General Statutes, the legislature has reserved the right to alter, amend, or repeal the plaintiff's charter, it does not follow that the legislature has the right to make *any* amendment they might see fit to make, regardless of the restrictions thrown around the exercise of legislative power by the organic law of the land; and certainly it would not follow that, under the guise of an amendment to the charter, the legislature could utterly disregard the mandates of the constitution in reference to the exercise of the taxing power, and go beyond the limits prescribed for the exercise of such power. The charter of a corporation can only be amended by an act of the legislature, and it is not everything which assumes the form of an act of the general assembly which has the force and effect of an act. If it is in conflict with any of the provisions of the constitution, it is not an act, no matter what may be its form. It is an absolute nullity.

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Hence whenever the legislature undertakes to make an amendment of the charter of a corporation by an act which has not been passed in the manner prescribed, or the terms of which are in conflict with some provision of the constitution, there is no amendment, because the act purporting to make such amendment is a nullity. Thus if the legislature should, in the most formal manner, pass an act declaring that the charter of a certain corporation should be so amended as that the half or the whole of its property should be turned over to another corporation, there could be no doubt that such an act would be an absolute nullity, being in direct conflict, not only with the plainest principles of justice, but also with the express terms of section 23, art. 1, of the Constitution, and hence there would be no amendment of the charter of such corporation. So if section 1453 of the General Statutes could be regarded as a proposed amendment to the charters of all the railroad corporations in the State, whose charters are subject to legislative control, though there is not a single word in the section which indicates that such was the purpose or intention of the legislature, yet if the provisions of such section are in conflict with the provisions of the organic law, as I think they are, in reference to the taxing power, then the section is an absolute nullity and there is no amendment to the charter of the plaintiff company.

But it is said that the company having accepted its charter, with full knowledge of the fact that the legislature had retained the right to alter and amend it, must be regarded as waiving the protection of any constitutional provision, and consenting, in advance, to any amendment the legislature might see fit to make, and, therefore, it is bound thereby as matter of contract. It must be remembered, however, that while the company, when it accepted its charter, must be regarded as having done so with notice of the fact that the legislature reserved the right to amend, yet it, at the same time, had notice of the several provisions of the constitution placing limitations upon the legislative power, and, therefore, it had a right to assume that the legislature could and would only exercise the reserved right to amend, within the limitations prescribed by the constitution. Hence it cannot properly be said that the corporation, by accepting its charter,

with notice of the reserved right to amend, consented that the legislature might make *any* amendment to its charter, but only such as it could make within the limitations prescribed by the constitution. It could not assume, or even anticipate that the legislature would violate the law of its existence, and undertake to do that which the people, in their sovereign capacity, had forbidden them from doing.

I think, therefore, that the judgment below should be reversed and the case remanded for a new trial.

Judgment affirmed.

The plaintiff filed a petition for rehearing, but it was refused *per curiam*, January 6, 1888, the court saying: "We have carefully considered this petition, and finding that no material fact or important principle of law has been overlooked, the petition is dismissed."

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PELZER, RODGERS & CO. v. HUGHES.

1. Interlocutory injunction is not a matter of right, but of grace, resting in the sound discretion of the judge; and such an order having been granted to maintain matters *in statu quo*, pending an action by creditors to set aside certain transfers and assignments as fraudulent, this court refused to vacate it.
2. The appointment of a receiver of property pending litigation, may be made by a judge at chambers; but the power of appointment is a delicate one and must be exercised with great circumspection, and if abused, may be corrected on appeal.
3. Except in the cases mentioned in section 2016, General Statutes, the court has no jurisdiction to appoint a receiver of an assigned estate at the suit of creditors who have not exhausted their legal remedies.
4. In action by unsecured creditors to set aside as fraudulent a deed of assignment for the benefit of creditors and a transfer of choses in action a few days prior to the assignment, it not being shown that the defendants were insolvent or that the property was in danger of being lost or materially injured, the Circuit Judge erred in appointing a receiver pending litigation, and in adjudging defendants (who had appealed) in contempt for failing to turn the property over to the receiver so appointed.

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5. A Circuit Judge may, without consent of parties, refer a chancery case to vacate certain assignments for fraud, "to the master to take the testimony and report upon the issues of law and fact involved therein." In such case, neither party has the right to a submission of the issues to a jury.

Before ALDRICH, J., Barnwell, January, 1887.

The opinion states the case.

*Messrs. Skinner & Williams*, for appellants.

*Messrs. T. M. Mordecai and B. H. Rutledge*, contra.

October 18, 1887. The opinion of the court was delivered by MR. JUSTICE MCGOWAN. As well as we can gather it from the very confused Brief presented, the following is a condensed statement of the leading facts of the case :

E. E. Hughes, one of the defendants, being largely indebted to Pelzer, Rodgers & Co. and others, on December 14, 1886, made an assignment of what purported to be his whole property to H. W. Walker, avowedly for the purpose of paying his debts, directing the assignee to realize upon the property included in the assignment, and pay out the proceeds : first, the expenses attending the execution of the trust, together with the sum of five hundred dollars to his attorneys, for services in and concerning the premises ; and then, out of the residue, to pay all his creditors who should, within a reasonable time, file their claims, accept the assignment, and discharge the said E. E. Hughes from liability, if there should be so much for that purpose ; but if there should not be so much, then to pay the creditors ratably ; and if, after paying the expenses and all debts, there should be a surplus, to return the same to Hughes ; and if there should not be enough to pay all the creditors in full, then no payment to be made to any of the creditors, except he or they accept the same in full satisfaction and discharge of their several demands, &c. The day after the execution of the said assignment, Walker, the assignee, sent a circular notice to the creditors to meet at Midway, S. C., on December 23, 1886, "to take such action in the appointment of an agent, as they might see fit."

On December 20, 1886, Pelzer, Rodgers & Co., in conjunction with other creditors of the said Hughes, filed the complaint in this case, against E. E. Hughes, W. B. Steedly, and H. W. Walker, charging that the said Hughes, only a few days before the execution of the aforesaid pretended assignment, with the intent to defraud his creditors, made a pretensive sale to Steedly of the best part of his assets, consisting of notes, bonds, mortgages, &c., amounting in value to nearly \$8,000, for the greatly inadequate consideration of \$3,230; and upon such pretended sale transferred the said choses to the said Steedly, which transaction was fraudulent and void, both under the statute of Elizabeth and the law of this State against fraudulent assignments, giving preferences; and also charging that the assignment to Walker a few days after the said transfer (which omitted the choses fraudulently and pretensively transferred as aforesaid), was also in the same manner fraudulent and void, &c., &c. The complaint prayed judgment against Hughes—that both the pretended sale to Steedly and the assignment to Walker should be set aside as fraudulent and void, and the parties named be respectively enjoined from proceeding to collect the notes, choses, &c., transferred to each of them; and that a receiver should be appointed to assume control of and collect the same. The complaint was sworn to, and Judge Aldrich granted the plaintiffs a temporary restraining order, and that the defendants should show cause before him, on January 6, 1887, why said injunction should not be made perpetual and a receiver appointed. (For convenience we will call this “order No. 1.”)

On January 4, 1887, the defendants answered the complaint on the merits, admitting that Hughes was insolvent, but denying each and every other important allegation of the complaint, and especially averring “that the choses in action, notes, bills, and all papers purchased by defendant, Steedly, from defendant, Hughes, were bought in good faith, for valuable consideration, and without any notice of the insolvency of Hughes,” &c.

After answer filed, the defendants, on affidavits submitted, moved to dissolve the injunction, and after hearing argument, the judge, stating that he “did not propose to decide the merits,” granted the plaintiffs an order on the 12th, which was filed on

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January 14, 1887, to the following effect, viz.: 1. Refusing to dissolve the injunction "save and except only to permit the defendants to comply with the provisions of this order—commanding the immediate paying over and delivery of all the property, notes, &c., to the receiver now about to be appointed," &c. 2. Appointing C. Carroll Simms receiver—directing both Steedly and Walker, within ten days, to turn over to him as such receiver all the property of every kind which may have passed as aforesaid into their hands respectively from the said E. E. Hughes. 3. Granting leave to apply to the court for a reference to the master to report the testimony, &c. We will call this "order No. 2."

On January 15, the defendants served notice that they would move that certain issues of fact in the case should be submitted to the decision of a jury, at the next term of the court.

On January 20, the judge granted an order that, "Whereas the defendants are about to appeal from the order of January 14, 1887, it is therefore ordered, that said appellants do execute to the clerk of the court a bond or undertaking in the sum of one hundred dollars, with two sureties, &c., to the effect that the appellants will obey the order of the Supreme Court upon the appeal, upon the filing and approval of which as aforesaid all proceedings under the order of January 14, 1887, are hereby directed to be stayed." (The bond was given.) Order No. 3.

On January 21, the defendants served notice of appeal from the order of January 14, 1887, upon grounds which will be hereafter stated. On the same day the judge, upon a report of the receiver that the parties refused to turn over to him the choses, under the order of January 14, ruled the defendants to show cause on January 26, 1887, why they should not be attached for contempt of court in refusing to obey the order, requiring them forthwith to turn over to the receiver the notes, choses, &c., which had come into their possession as aforesaid. Order No. 4.

On January 26, the judge granted three orders, one revoking the order of January 20, granting a stay herein pending the appeal from the order filed January 14; another, referring the case to G. Duncan Bellinger, Esq., master, "to take testimony and report upon all the issues of law and fact involved therein;"

and still another, making the rule against the defendants for a contempt of court absolute *nisi*, as follows: "That unless the said defendants do respectively obey the provisions of the order of this court, dated January 12 (but filed January 14, 1887), on or before 12 o'clock m. of Tuesday next, February 1, 1887, the said rule be made absolute," &c. The defendants on the same day filed a petition, recalling the attention of the court to the staying order, and praying that as they had appealed from the order of January 14, that said stay might be continued "upon their executing such bond as he might direct," which petition was "dismissed."

Defendants' exceptions to the order of January 14, 1887:

"1. Because his honor erred in not considering the merits of the cause, under the affidavits submitted—this being a hearing of the return to the rule to show cause why the injunction should not be made perpetual, &c., by order made December 21, 1886.

"2. Because his honor erred in making said injunction perpetual on a hearing at chambers upon a rule to show cause.

"3. Because it was error after requiring security upon the issuing of the restraining order to continue such injunction without security.

"4. Because it was error in his honor to refuse to dissolve said restraining order, for the reason that no security was filed by plaintiffs according to rule of court.

"5. Because his honor erred in the said order of January 14, 1887, by giving in effect judgment to the plaintiffs, upon the prayers for judgment of the complaint, numbered 1, 2, 3, 4, 5, 6, 7.

"6. Because the defendants showed sufficient cause by affidavit and otherwise (on the return of the rule herein to show cause), why the said injunction should be dissolved.

"7. Because the plaintiffs did not show that they were entitled to have a receiver of said property appointed, and his honor's order appointing one was error," &c.

Defendants' exceptions to orders January 26, 1887:

"1. Because his honor was without authority to refer the case to the master, thereby superseding the defendants' application to the court in term to submit the issues therein to a jury, notice of which had been regularly given.

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"2. His honor erred in vacating the order of January 20, suspending further proceedings under the injunction order, January 14, the defendants having complied with the condition and given bond.

"3. His honor erred in refusing defendants' petition to stay proceedings under the order of January 14, upon their bond as directed.

"4. His honor erred in holding the defendants liable for contempt of the order of January 14, when it was suspended, and there was no testimony to show the defendants in contempt—no process served on them that they had disregarded, and they had fully excused themselves under their oaths.

"5. Because the order of January 14, requiring the defendants, Steedly and Walker, to deliver the documents and personal property in their hands, under lawful claims and title thereto, to a receiver, who was required to convert the same, was contrary to law, and the enforcement of such order by penal process was not warranted by law."

For several reasons the questions raised on this appeal are unusually embarrassing. In the first place the "Brief" is very far from perfect; and then the merits of the case have never been reached, but all the questions made are preliminary and relate to points of procedure, determined on the pleadings and affidavits, as to which the Circuit Judge has large discretionary powers. As we understand it, however, the principal questions controverted may be condensed into four: 1. Was it error of law in the judge to grant a provisional injunction, enjoining the defendants, Steedly and Walker, respectively, from making any sales, release, transfers, or other collections of the assets in their hands, until a decision upon the merits of the case? 2. Was it error to appoint a receiver, with authority to take the said notes, mortgages, property, &c., out of the possession and control of said defendants, respectively? 3. Was it error to adjudge the defendants in contempt of court for not turning over the choses, &c., to the receiver? 4. Was it error to refer the case to the master against the protest of the defendants, who claimed the right to have certain issues of fact referred to a jury?

In order to have a clear view of these questions, it will be



necessary to keep in mind the nature and objects of the action and of the defence made. The action was by several creditors united, whose debts were neither adjudicated nor secured, and one object seemed to be to recover judgment on these respective claims against the debtor, Hughes. But the judge at chambers having no right to render judgment did not undertake to do so, and that matter is not before us. The main object, however, manifestly was to set aside the alleged sale and delivery of the valuable choses of Hughes, the debtor, to Steedly, as fraudulent and void; and as connected therewith, to have the assignment to Walker also declared void, and thus to reclaim all the property, notes, &c., as still belonging to the debtor, Hughes. The defendant, Steedly, claimed in the most positive terms that the choses in his possession were purchased by him *bona fide*, and for a valuable consideration paid. The assignment to Walker (after the services of the lawyers and the expenses of administration were paid) provided for a ratable distribution among creditors, including the plaintiffs, and we therefore suppose that the real gravamen of the action was to set aside the alleged transfer of the choses to Steedly, claimed by him as purchaser.

First. As to the order for a provisional injunction. No objection was made to the restraining order issued when the complaint was filed. The defendants were served with rule to show cause why a provisional injunction should not issue. In the mean time they had answered to the merits and given notice of an application to dissolve the injunction. Being before the judge in this double manner, he refused to dissolve, but ordered the injunction continued until the case could be heard upon its merits. Was this error? Injunction is defined to be a judicial process whereby a party is required to do or to refrain from doing a particular thing. It is, however, generally used (always before a decree upon the merits) to prevent a meditated wrong, and therefore is regarded more as a preventive than as a restorative or remedial process. "When during the litigation it shall appear that the defendant is doing, or threatens or is about to do, or procuring or suffering some act to be done in violation of the plaintiffs' rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted

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to restrain such act." *Code*, section 240. The sole object is to preserve the subject of controversy in the condition in which it is when the order is made until an opportunity is afforded for a full and deliberate investigation. It cannot be used to take property out of the possession of one person and put it into that of another.

Injunction is not a matter of right, but of grace, resting in the sound discretion of the judge. The judge before whom the motion was made, and who had the right to decide it in the first instance, thought a *prima facie* case was made for a provisional injunction against both Steedly and Walker; and, considering the object of injunction and the character of the property involved, we are not prepared to say that therein he committed error of law, subject to be corrected by this court. "It should be borne in mind that a complainant may be entitled to a preliminary injunction, although his right to the relief prayed may ultimately fail. A court of equity will, in many cases, interfere by injunction to preserve property in *statu quo* during the pendency of a suit in which the rights to it are to be decided; and that without expressing, or often without having the means of forming, any opinion as to such rights. \* \* \* In doubtful cases the court weighs the nature and extent of the injury which will arise to either party from the granting or withholding of an injunction, and determines the question of equitable relief in the manner best calculated to promote substantial justice." 3 *Wait Act. & Def.*, and the authorities there cited—title "injunction"—pages 682 and 689.

Second. As to the appointment of a receiver. The appointment may be made by a judge at chambers. *Kilgore v. Hair*, 19 *S. C.*, 486. It is a stronger measure than that of an injunction, in that the effect is to transfer the custody of the property in controversy from a litigant to a third party under the direction of the court during the litigation. It is not so much in the nature of an attachment as of a sequestration. The proceeding generally is salutary in its operation, as tending to prevent loss and promote justice. It is, however, well settled that it is not allowable in every case, but is confined to those of a particular class, or classes. It is universally conceded, "that the power of ap-

pointment is a delicate one, and is to be exercised with great circumspection." Although the order is interlocutory and somewhat administrative in its character, and, in a certain sense, discretionary with the court or judge granting it, yet that is not an arbitrary discretion, but the determination, if not in conformity with well established rules, may be reversed on appeal. *De Walt v. Kinard*, 19 S. C., 286; *Kilgore v. Hair*, *supra*; *Milwaukee & Minnesota R. R. Co. v. Scutter*, 2 Wall., 521.

The right to have a receiver appointed is an ancient one, but it has been formulated by the code as follows: "A receiver may be appointed by a judge of the Circuit, either in or out of court, before judgment, on the application of either party, when he establishes an apparent right to property, which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired," &c.<sup>1</sup> After some discussion upon the subject it seems to have been reasonably well settled that as "a rule a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined." 5 *Wait Act. & Def.*, 356; 3 *Pom. Eq. Jur.*, 358, and notes. Although it would be improper, upon a preliminary motion, to inquire into or express any opinion as to the merits of the case, the terms of the rule indicated above seem to make it necessary upon an application for a receiver to take at least a general view of the scope of the pleadings and the issues made.

This is a suit in equity, and the appointment of a receiver appertains exclusively to that jurisdiction. When the receiver was appointed the plaintiffs had not obtained judgments on their demands, and, of course, had not exhausted their legal remedies against the debtor, Hughes; and therefore the judge had no jurisdiction to appoint a receiver, unless there was something in the case which made it exceptional. "Creditors who have neither lien nor title, and have not recovered judgments, are not entitled to an injunction and receiver in a suit to set aside an assignment

<sup>1</sup> Section 265.

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or pretended sale by the debtor of his assets." *Johnson v. Far-num*, 56 Ga., 144; 5 *Wait Act. & Def.*, 376. But the complaint prayed, among other things, special relief under chapter 72 of the General Statutes, which authorizes creditors, under certain circumstances, to attack and set aside as "void" a voluntary assignment, giving preferences to some creditors, "without first obtaining and entering up judgment against said debtor," &c.; and so far as concerns a violation of that special act, the Circuit Judge undoubtedly had jurisdiction to consider the subject of appointing a receiver. See section 2016, General Statutes. Limiting, then, the inquiry to relief under the assignment act, were the plaintiffs entitled to the appointment of a receiver to take the property and choses out of the possession and control of the defendants?

As to Dr. Steedly. He undoubtedly had possession of some choses which had belonged to the debtor, Hughes, but he claimed them not as assignee or trustee, but as absolute owner under an alleged purchase from Hughes for valuable consideration paid, and without notice of his insolvency. It did not appear that he was a creditor of Hughes. He had possession and *prima facie* title; and in such case, as Lord Eldon said in *Lloyd v. Passingham*, 16 Ves., 69: "The court must not only be satisfied of the existence of the fraud, but be morally sure, upon the hearing of the cause, the party would be turned out of possession." *Hoff. Prov. Rem.*, section 244. As to Walker, the assignee. He was at least a *quasi trustee*, and, under Mr. Pomeroy's third class of cases, in which a receiver may be appointed (3 vol., page 361), he was entitled to retain possession of the property, which could not be taken from him, unless shown to be guilty of some breach of trust. We do not understand that any such breach was charged against him, and he seemed to be making reasonable progress in the business when this action was commenced.

Besides, it was not shown that the property, either in the hands of Steedly or of Walker, was in danger of being lost or materially injured, without the intervention of a receiver. It is true that there was abundant allegation in the complaint that the sale to Steedly and the assignment to Walker were fraudulent.

and void; but that allegation was denied, and it is remarkable that neither in the complaint nor the affidavits submitted was it alleged that either of them was insolvent, or that there was danger of loss or injury to the property pending the litigation. On the contrary, it appeared in the affidavits, without contradiction, that they were both persons of good character.

Having respect for the Circuit Judge, whose duty it was to decide the point in the first instance, when the motion was made before him, we have hesitated to differ from him upon a question peculiarly within his judicial discretion; but conceiving it to be our duty, we have carefully reviewed the whole case and are constrained to hold that, according to the rules governing in such cases, there was no case made for the appointment of a receiver, and that such appointment, with authority to take possession of the property pending litigation, was error. This disposes also of the third question as to the contempt. The orders upon that subject are reversed.

Fourth. The only remaining question is whether it was error to refer the case to the master against the protest of the defendants, who claimed the right to have certain issues of fact referred to a jury. The issues in the case, certainly as to Steedly and Walker, are on the equity side of the court, which has no machinery for jury trials, and as a rule all questions, whether of law or of fact, are decided by the judge sitting as chancellor. If he desires the aid of a jury upon a question of fact, he may order an issue for that purpose merely to enlighten his conscience. This court has decided that section 274 (276) of the code specifies the classes of cases in which a jury trial may be demanded as a legal right. In all other cases it is discretionary with the Circuit Judge, and from his determination no appeal lies. *Rolin v. Whipper*, 17 S. C., 32. The section referred to is as follows: "An issue of law must be tried by the court, as also cases in chancery, unless they be referred as provided in chapter 5 of this title. An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial is waived," &c. We do not regard this an action either for the recovery of money only or of specific real or personal property.

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The judgment of this court is, that the judgment of the Circuit Court be modified according to the conclusions herein announced, and that in all other respects it be affirmed.

## CHICK v. NEWBERRY AND UNION COUNTIES.

## HENDERSON v. SAME.

1. The Court of Common Pleas has original jurisdiction of such actions *ex delicto* as may, by law, be prosecuted against a county, where the act complained of is the result of alleged negligence on the part of the county commissioners.
2. Municipal corporations are not liable in a civil action for damages, unless made so by statute. And where a county is made liable for damages caused by defective *highways, causeways, or bridges*, it is not thereby made liable for injuries caused by a defective flat-boat on a ferry operated by the county commissioners.
3. A flat-boat at a ferry connecting the highways on the opposite banks of a river, is not itself a highway within the meaning of this statute. *Gen. Stat.*, 1087.
4. Whatever may be the jurisdiction of county commissioners over ferries (*Const.*, art. IV., § 19), no action can be maintained against the county for damages except in cases specially provided for by law.
5. Nothing done by county commissioners can operate by way of estoppel to subject a county to an action not authorized by law.

Before FRASER, J., Newberry, November, 1886.

The opinion states the case.

*Messrs. Y. J. Pope and Johnstone & Cromer*, for appellants.

*Messrs. Goggans & Herbert and William Munro*, contra.

October 26, 1887. The opinion of the court was delivered by MR. JUSTICE MCGOWAN. These cases were heard together on the Circuit, and will be so considered here; but to prevent confusion, the observations made will be addressed to the first case stated—that of Mrs. Chick—intending that they should apply equally to the other case.

In 1874 the legislature passed an act, "That the county commissioners of Newberry County be, and they are hereby, authorized and required to build a bridge across Tyger River, at or near by Gordon's Ferry in said county; that the said bridge shall be free, and no toll or charges whatever be collected for crossing said bridge," &c., and a few days after passed another act providing, "That if any bridge over the waters of this State, which constitute a boundary line between counties, shall be necessary to be erected or repaired, it shall be the duty of the commissioners of said counties to cause the same to be erected or repaired," &c. 15 *Stat.*, 787. Tyger River, a fresh water stream not navigable at the point known as "Gordon's Ferry," is the boundary line between the Counties of Newberry and Union. The pleadings do not inform us whether the free bridge directed by the above act, was ever built or not; but the plaintiff alleges that in 1886, "the Counties of Newberry and Union jointly owned and operated a flat boat at Gordon's Ferry on Tyger River, and transported wagons and teams for the public across said river; that said flat-boat was defective, and while transporting across said river a wagon belonging to the plaintiff, laden with wheat, sank, whereby the wagon and wheat were lost and, a mule drowned, to the damage of the plaintiff three hundred dollars," &c.

The cause came on for trial, and the defendants—the Counties of Newberry and Union—interposed an oral demurrer, upon two grounds: "First, that the Court of Common Pleas has no original jurisdiction to try such actions, but only appellate jurisdiction; and, second, that the complaint does not state facts sufficient to constitute a cause of action." His honor, Judge Fraser, sustained the demurrer on the second ground—that the complaint did not state facts sufficient to constitute a cause of action against the counties jointly or severally; and the plaintiff appeals to this court upon the following grounds: "1. Because his honor erred in sustaining the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action. 2. Because his honor erred in sustaining the demurrer, by holding that the statutes now of force in this State, independent of any charge of negligence, do not give any right to recover against.

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the defendants. 3. Because his honor erred in holding that the defendants have no legal right to own and operate the ferry, in the operation of which the damages complained of occurred," &c.

As to the question of jurisdiction. We think this was not a simple "county claim," within the meaning of the decision in *Jennings v. Abbeville County* (24 S. C., 548), which should have been preferred originally before the county commissioners, and could only get into the Court of Common Pleas by appeal. The action is not upon a breach of contract made by the county commissioners, but for damages on account of alleged negligence on their part—an action *ex delicto*—and it would be against all principle and the analogies of the law for them to be judges in their own case. The plaintiff clearly has no redress unless it can be afforded by the Court of Common Pleas.

Can that court give it? It may be that, if the persons known as the county commissioners had individually established a private ferry at the place indicated, and had undertaken to put across the public generally and their property for compensation, they might have been made liable for damages occasioned by their negligence. See *Littlejohn v. Jones*, 2 *McMull.*, 368; 39 *A. D.*, 132. But here the question reaches further than that, and is whether the county commissioners, in establishing the ferry and acting negligently, so represented the county, as to make it (the corporation) responsible in damages for their negligence. Neither municipal corporations nor *quasi* corporations nor such other public bodies as are charged with like duties, are liable in a civil action for damages, unless imposed by statute. *Young v. City Council of Charleston*, 20 *S. C.*, 116. By the act of 1874, re enacted in the General Statutes as section 1087, it is provided that, "Any person, who shall receive bodily injury or damage in his person or property through a defect in the repair of a highway, causeway, or bridge, may recover, in an action against the county, the amount of damage fixed by the finding of a jury," &c.

Does this act authorize the action? Prior to its adoption, the disability in such cases (against the county) was general, and still remains as to all except such as are taken out by the act, which certainly does not, in express terms, cover this case. Neither the



word "ferry" nor "flat-boat" occurs in the act. It is urged, however, that the act affording a remedy in certain cases not allowed before, is remedial in its character, and should, therefore, be construed liberally; that, as it provides relief for an injury arising from a defective "bridge," a "flat-boat" substituted for a bridge comes within the spirit and object of the act, and it should be so declared. It is true, there are some cases in which the court may give a liberal construction to an act of the legislature, but we disclaim the right to supplement by way of amendment. Our province is not to make, but to declare, the law. The act in question undertakes to enumerate the cases in which the right to sue the county is given, *viz.*, for "defects in the repair of a highway, causeway, or a bridge." This enumeration, as it seems to us, excludes matters not enumerated. It cannot be said with certainty, that it was the intention to include defects in the appliances for running a ferry, and that it was a mere *casus omissus* to omit all reference to that particular subject. There may have been some good reason for not including "a ferry" or "ferry-boat," and we cannot venture to add it to the list. That is a matter exclusively for the legislature.

It is, however, argued that, although the act makes no express reference to a ferry or its usual appliances, it does expressly allow an action for damages caused by "a defect in a highway," and as the flat-boat at the ferry crossed the stream and connected the highway on one side with the same continuing on the other side, it may be regarded as the highway from bank to bank, and therefore within the purview of the act. This is certainly ingenious, but is it sound? The definition of a highway is: "A passage that is open to all the public. Thus public rivers are in law considered as highways. A highway need not necessarily be a thoroughfare. The interest of the public in a highway consists solely in the right of passage over it. Thus a highway over land (which is what is usually meant by a highway) gives the right of walking, driving, and riding," &c. 1 *R. & L. Law Dict.*, title "Highway." As we understand it, there is "no right of passage" at any particular point across a river, except where there is a legally chartered ferry, conferring the franchise to keep a boat for ferrying passengers, &c. The act here authorizing the

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establishment of a free bridge did not include a ferry, for the words "at or near by Gordon's Ferry," only indicate the location of the bridge.

Possibly the means employed (such as a flat or boat), in connecting the highway on one bank with its continuation on the other, might, in some general sense, be called a part of the highway, even without a charter. But the question here is one of construction; in what sense did the legislature use the word "highway"? As indicated in the definition given above, the ordinary meaning of the word "highway" is a passage on land. It was used in the act in connection with the words "causeway" and "bridge." A bridge spanning the water and connecting the banks, would seem nearer to being a "highway" than a ferry-boat, and as it was deemed proper or necessary to express the case of "a bridge," it would seem to be a strained construction that it was unnecessary to mention a "flat-boat" or ferry, for the reason that it was already included in the word "highway." As the law makers were fixing a list of exceptions to the rule, it would seem that, if they had intended to include a flat-boat running across the river, they would have said so.

Besides, it is somewhat significant that another distinct clause of the general statutes (1094), which undertakes to define the duties of county commissioners in regard to crossings over streams, which constitute boundary lines between counties, makes no mention whatever of "ferries" or "boats." While the law does require a county, through its commissioners, to keep its highways in good repair, on pain of being sued for damages occasioned by their being out of repair, we have not been able to reach the conclusion that it was within the contemplation of the legislature either to include "ferries" regularly chartered by third persons, or to authorize the county commissioners themselves to own and operate a flat-boat for the public, so as to make the county, in its organized capacity, responsible in an action *ex delicto* for damages, caused by their non-feasance or malfeasance.

But it is still further suggested that, without any reference to the act of the legislature authorizing the county commissioners of Newberry and Union to establish a free bridge at or near by Gordon's Ferry on the Tyger River, they had the right, under

the constitution itself, to establish for the counties a free ferry, at the place indicated, or any other point, where the river is the dividing line between the two counties; that the Newberry board had the right to go to the middle of the river, and that of Union to meet them there—thus establishing a free ferry across from one bank to the other. The constitution does give the county commissioners “jurisdiction over roads, highways, ferries, bridges, \* \* \* and in every other case which may be necessary to the internal improvement and local concerns of the respective counties,” &c. This is certainly a large jurisdiction yielded by the State to the county boards, which undoubtedly does embrace the over-looking and keeping in repair of the highways and bridges. It might be interesting to inquire whether this jurisdiction, conferred by the constitution of 1868, gives to the county boards respectively the right to establish and charter a ferry within the county. It seems that such has not been the view of the legislature, for sections 1149 and 1150 of the General Statutes provide specifically how and under what circumstances the legislature shall grant the charter of a ferry, &c. But it is not necessary to go into that now. Whatever may be the constitutional jurisdiction of the county commissioners “over ferries,” it is well settled in this State that the county cannot be sued for damages except in the cases specially provided for in the act, which we have already endeavored herein to construe and interpret.

It is finally argued that the county is estopped by the acts of the commissioners from denying its liability for damages, arising out of the alleged mismanagement of a business, established and conducted by the authorized officers and representatives of the county and for the benefit of its citizens. If, in operating the ferry, the commissioners were acting within the scope of their authority, and the injury received were one of those for which the act so often cited provides a remedy, by action of law against the county, then there would be no need of the doctrine of estoppel. But as, in our view, the injury complained of is not within the purview of the act, which alone allows a county, in its organized capacity, to be sued, we think the doctrine of estoppel has no application to the case. See *Black v. City of Columbia*,

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19 S. C., 413; *Young v. Charleston*, 20 *Id.*, 116; *Gibbes v. Town Council of Beaufort*, *Ibid.*, 213; and *Acker v. County of Anderson*, *Ibid.*, 495.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

## BRIDGERS v. HOWELL.

1. At common law, the services of a wife belong to her husband, and therefore her earnings—the acquisitions made by such services—also belong exclusively to the husband; and there is nothing in the constitution or statutes<sup>1</sup> of this State to affect this common law principle.
2. Where a husband purchases property in his wife's name with her earnings, the property so purchased may be subjected to the payment of debts of the husband, then existing.
3. The Court of Common Pleas has no original jurisdiction to set off a homestead, but it has jurisdiction in the course of a proceeding otherwise properly before it, to adjudicate simply the right to homestead.
4. Where a debtor puts his money into a house and lot purchased from another, but has the deed made to his wife, his creditors have the right to follow these funds, but have no right to the property itself.
5. In such case there is no resulting trust to the husband, for he intended a gift, and therefore he has no estate in the property, either legal or equitable, out of which he is entitled to claim a homestead.
6. It may be that a homestead may be claimed in real estate to which the debtor has only an equitable title.
7. Where a debtor uses his own money in the purchase of a lot of land in his wife's name and for her benefit, his creditors cannot follow and subject to their claims so much of this money as the debtor was entitled to retain as his personal property exemption.
8. Defendant cannot, on appeal, demand that the proceeds of sale should go to all his creditors and not to the plaintiff only, when no such point was raised on Circuit, no demurrer interposed for defect of parties, and no application made by defendant to require other creditors to be called in.

<sup>1</sup>This decision was rendered prior to the act of December, 1887 (19 Stat., 819), which declares: "Sec. 2. That all the earnings and income of a married woman shall be her own separate estate and shall be governed by the same provisions of law as apply to her other separate estate."—REPORTER.

Before COTHRAN, J., Darlington, October, 1886.

This was an action by P. L. Bridgers, doing business as P. L. Bridgers & Co., against Edward Howell and Margaret E., his wife. The opinion fully states the case, but it may be added that the earnings of the wife in this case were derived from keeping a boarding-house and restaurant, selling ice cream, and sewing.

*Mr. J. T. Barron*, for plaintiff.

*Mr. B. O. Townsend*, contra.

October 29, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. The plaintiff, having recovered a judgment against the defendant, Edward Howell, the execution upon which had been returned *nulla bona*, instituted this action for the purpose of subjecting to the payment of his debt certain real estate, consisting of a house and lot in the town of Florence, upon the ground that the same was purchased with the money of said Edward Howell, though the title was made to his wife, the defendant, Margaret E. Howell. It seems that Edward Howell negotiated the purchase of the house and lot from John Kuker, who regarded him as the purchaser, for the sum of eleven hundred dollars, of which five hundred dollars was to be paid in cash and the balance on a credit, secured by bond and mortgage. On November 10, 1880, the cash portion of the purchase money was paid by the Rev. J. E. Wilson in the name of Margaret E. Howell, and the title taken in her name, the balance of the purchase money being secured by her bond and mortgage.

The case was referred to a referee to hear and determine all the issues, who made his report, finding, with some hesitation, that the purchase of the property was made in good faith by Margaret E. Howell, and that the cash portion of the purchase money was paid by her out of her own earnings, which he held she was entitled to, both against her husband and his creditors; but that the credit portion of the purchase money was paid with the funds of Edward Howell, who, being in debt at the time, his

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creditor could follow the same into the property in which such funds had been invested in the name of his wife. He also disallowed a claim for homestead set up by Edward Howell, and recommended that the plaintiff have judgment: 1st. That Margaret Howell pay to the clerk of the court within thirty days the sum of six hundred dollars (the credit portion of the purchase money), with interest thereon from November 10, 1880, to be by him applied first to the payment of plaintiff's costs and the expenses of this action, and next to the plaintiff's judgment. 2d. That, in default of such payment, the property be sold and the proceeds, after deducting the expenses of the sale, be applied, first, to the payment to Margaret E. Howell of the sum of five hundred dollars, without interest, and the balance, to the extent of six hundred dollars, and interest, be applied to the payment of plaintiff's costs and expenses and to the payment of plaintiff's judgment, and the surplus, if any, should be held subject to the further order of the court.

To this report both parties excepted and the case was heard by Judge Cothran upon the report and the exceptions thereto. He held that the earnings of a married woman, derived from her own labor and services, belong to her husband, and therefore all the money used in paying for the house and lot belonged to the defendant, Edward Howell, and the same is liable for his debts, except to the extent of any claim of homestead that he may successfully maintain. As to this point, he held that Edward Howell having paid the purchase money and taken title in the name of his wife, there was a resulting trust in his favor, and that he was entitled to a homestead in such an estate; but inasmuch as the Court of Common Pleas has no jurisdiction to assign and set off a homestead, he simply adjudged: 1st. That Edward Howell, as the equitable owner of the house and lot in question, was entitled to a homestead exemption therein. 2d. That he do, within a time limited, institute such proceedings as he may be advised are requisite for the purpose of having his homestead assigned and set off to him, and that upon his failure so to do the property be sold. 3d. That in the event of such sale, the proceeds be applied, first, to the payment of the costs of this action, and the balance be held subject to the claim of Edward Howell to

homestead, "to the extent of one thousand dollars, under the further order of this court as to that sum and any residue that may be over." 4th. That in case the defendant, Edward Howell, shall perfect his claim to homestead in the said premises, then out of any surplus that there may be, the costs of this action be first paid, and the balance, if any, be applied to plaintiff's judgment. 5th. That the deed from John Kuker to Margaret Howell be declared null and void, except in so far as it shall operate to take the title out of John Kuker, and that the same be delivered up to the clerk to be by him cancelled, and that the clerk do make any deeds which may be necessary to carry out the provisions of this judgment.

From this judgment both parties appeal upon the several grounds set out in the record, but which need not be set out in detail here, as they raise, substantially, but three questions: 1st. Whether the earnings of a married woman, derived from her personal services or labor, belong to her husband. 2d. Whether Edward Howell is entitled to any claim of homestead. 3d. If so, whether he can claim to the extent allowed in real estate, or only to that allowed in personal property.

As to the first question, we agree entirely with the Circuit Judge. There can be no doubt that, at common law, the earnings of a married woman, derived from her personal services, belonged exclusively to her husband. This, we believe, is universally conceded, and therefore the only inquiry is whether this long established and well settled doctrine of the common law has been changed, either by constitutional provision or by statute law. Our constitutional provision upon the subject of the rights of married women relates exclusively to her rights of *property*, and does not even purport to make any change whatever in the *status* of a married woman, or in the personal relations existing between herself and her husband. It gives her no new property. It does not declare that anything shall be her property which would not have been so previous to the adoption of the constitution; but it simply secures to her the property which she may have at the time of her marriage, or may thereafter acquire, by exempting it from liability for her husband's debts, and by vesting in her the uncontrolled disposition of such property.

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As was said by Mr. Justice McGowan in *Pelzer, Rodgers & Co. v. Campbell & Co.* (15 S. C., at page 596): "The main object of the provision in the constitution seems to have been, not so much to declare the rights of *the wife*, as to negative those of *the husband* in regard to her property—not to *enable her*, but to *disable him and his creditors*." And as is said in *Townsend v. Brown* (16 S. C., at page 96), in speaking of this constitutional provision: "The real purpose, therefore, does not appear to have been to confer any new powers upon a married woman by changing her legal status, but simply to protect her property from liability for her husband's debts and to release it even from the partial control of the husband, by dispensing with the necessity, which had previously existed, of obtaining his assent and concurrence before her property could be disposed of. These seem to have been the sole purposes of the clause in question, and as they can be fully accomplished without in any manner affecting any of the other relations between husband and wife growing out of marriage, we think we are bound to confine the operation of this clause of the constitution to its declared and manifest objects."

Now if, as we have seen, the earnings of a married woman, prior to the adoption of the constitution, never were the property of the wife, but belonged exclusively to the husband; and if, as we have also seen, there is nothing in the constitution which takes away this property from the husband and confers it upon the wife, it follows necessarily that such earnings still belong to the husband, unless some change has been made by the statute law. The statute relied on for this purpose will be found in sections 2035, 2036, and 2037. Certainly there is nothing in either of these sections which even purports to make that which unquestionably belonged to the husband at common law the property of the wife. They simply enlarge the powers of the wife over her own property, without undertaking to invest her with property previously belonging to her husband. Indeed, so far from these sections containing a single word intimating a purpose to take away from the husband his well settled right to the personal earnings of his wife, the language of the proviso to section 2037 would rather seem, impliedly at least, to recognize such right upon the part of the husband. That proviso reads as follows:



"Provided that the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, *except for her necessary support.*" This leaves the liability of the husband for the support of his wife the same as it was at common law, and would seem to imply that the intention of the legislature was to leave his correlative right to his wife's earnings unimpaired; for the common law doctrine of the husband's right to his wife's services and earnings seems to rest, in part at least, upon his obligation to support her; and, therefore, as long as such obligation continues to rest upon him, the corresponding right should be recognized.

As is well said by Ruffin, J., in discussing a similar question in the case of *Syme v. Riddle*, 88 N. C., 463: "There is certainly nothing in the constitution or the statute which, in terms, or by a necessary implication, secures to a married woman her separate earnings; and by nothing short of a plain expression of such an opinion of such an intention could this court be induced to give them that construction. If entitled, as a matter of right, to her own earnings, then must she be entitled to the time and opportunity necessary to make them; and that is to say that she may, at her own election, and without the consent of her husband, forsake her domestic duties and go out to labor for another for the purpose of acquiring earnings for her separate use. There can be no middle ground taken in the matter; for the one right, if admitted, necessarily draws to it the other, and we cannot suppose that those who framed the organic law or the statute intended to introduce any such anomalous conditions into the law regulating the relations of husband and wife in this State. Certainly there is nothing in the words used in either instrument to warrant such a supposition, and much less to force it upon the courts."

It is argued, however, that the language of the constitution<sup>1</sup> declaring that "the real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise, or otherwise," is broad enough to cover acquisitions made by a married woman's labor. That is quite true, but this argument assumes the very point

<sup>1</sup> Article XIV., section 8.

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in issue, to wit, that a married woman's personal services belong to herself, and not to her husband, whereas the reverse of this proposition was undoubtedly true at common law, and, as we have seen, neither the constitution nor any statute has made any change in the common law doctrine. Hence, as the services of the wife belong to her husband, all acquisitions made by such services belong to him also.

From this it follows that both in fact and in law the whole of the purchase money of the premises in question was paid by Edward Howell, and he being in debt at the time to the plaintiff, the property so purchased and given to his wife can be subjected to the payment of such debt, regardless of whether he had any actual fraudulent intent in so doing, upon the principle that a man must be just before he is generous—a principle fully recognized by the present constitution, when it declares in the proviso to section 8, art. XIV., securing the rights of married women, "that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors." Here the husband did undertake to make a gift to his wife of property purchased with his own funds, which should have been applied to the payment of his debts, and his wife cannot acquire any rights thereby "detrimental to the just claims of his creditors." It is clear, therefore, that there was no error on the part of the Circuit Judge in adjudging that the property in question was liable for the debts of Edward Howell.

The next inquiry is as to the right of homestead. While it is quite true that the Court of Common Pleas has no original jurisdiction of a proceeding to *assign or set off a homestead* (*Ex parte Lewie*, 17 S. C., 153; *Scruggs v. Foot*, 19 Id., 274; and *Myers v. Ham*, 20 Id., 522), yet, as was said in *Munro v. Jeter* (24 S. C., 29), it does not follow that the Court of Common Pleas has no jurisdiction to determine simply *the right* to homestead, where, in the course of some proceeding properly before it, it becomes necessary to adjudicate *the right* of homestead, leaving the party to enforce such right by a proper proceeding before the appropriate tribunal. This seems to have been the view adopted by the Circuit Judge, for he simply determined the

question of right, and by his judgment made provision for the enforcement of such right by a proper proceeding.

So that the questions for us to determine are, whether the Circuit Judge erred in adjudging that Edward Howell was entitled to homestead, and if not, whether he erred in adjudging that said Howell was entitled to the amount of exemption allowed in real estate, or whether he should not be confined to the amount allowed in personal property. Inasmuch, however, as it is contended that Edward Howell has already been allowed his personal property exemption as against the plaintiff's judgment, and the referee so found (upon what seems to us rather slender evidence of that fact—the statement in the testimony of Edward Howell, that when the sheriff went to his store he “found nothing above homestead,” which is scarcely sufficient to show that any personal property had been set off to Howell as exempt under the homestead laws, but would rather seem to indicate that the sheriff made no levy because he supposed that the amount of personal property which he found in the store would not be equal to the amount of the exemption allowed); and inasmuch as the Circuit Judge made no ruling upon this point, it being unnecessary for him to do so under the view which he took, we do not propose to decide anything as to the question whether Howell has already been allowed his personal property exemption, but we propose to leave that question, as well as the question not alluded to in the argument—whether the plaintiff's debt or a part thereof was contracted before or after the ratification of the amendment of 1880 to the constitution, whereby a person could claim an exemption in any species of personal property and is not limited to the specific articles named in the constitution as originally adopted—to be considered and determined when Howell institutes the proper proceeding to have his homestead exemption assigned to him, as permitted to do by the judgment of the Circuit Judge. We shall therefore confine ourselves to the inquiry, whether the fact that the house and lot was bought with the funds of Edward Howell, though the title was taken in the name of his wife, will exclude his claim of homestead in such house and lot; and if so, whether he will be thereby excluded from claiming a personal property exemption in the money used in making the purchase.

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It will be observed that this is not a case where a debtor has conveyed *real estate*, to which he had the legal title, to another as a gift, which operated as a fraud upon his creditors, for here Howell never had the legal title to the property; but it is a case where a debtor has invested his money, to which his creditors had the prior right, in certain real estate which he has had conveyed to his wife as a gift, to the prejudice of the rights of his creditors, and they, therefore, have the right to follow *that money* into the property. They have no right to *the property*, because it never belonged to their debtor; but they have a right to the funds of their debtor which did belong to him, improperly invested in such property, and they may, if necessary, have the property sold for the purpose of getting out of it that to which they have a right.

The Circuit Judge held that the purchase money having been paid by the husband and the title taken to the wife created a resulting trust—an equitable estate—in which he would be entitled to claim a homestead. While it may be true that, under the present constitution, a homestead may be claimed in real estate to which the debtor has only an equitable title (*Munro v. Jeter*, 24 S. C., 29), we are not prepared to admit that Howell had any equitable estate in this property, either by way of resulting trust or otherwise. In *Hill on Trustees*, \*91, it is said that a resulting trust arises “where, upon a purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, *the parties being strangers to each other*” (italics ours). Accordingly we find that the same author, at page \*97, says that where a father purchases property and takes title in the name of his child, the transaction will be regarded as an advancement for the child, and not a trust for the parent, unless it can be shown to have been the intention of the parent that the child should not take beneficially. And at page \*98, he says the same doctrine of advancement applies equally in the case of a purchase by the husband in the name of his wife, the presumption in all such cases being that a gift, and not a resulting trust, was intended. The same doctrine is laid down in 2 *Story Eq. Jur.*, sections 1202 and 1204. Now, as there is not the slightest evidence that there

was any intention on the part of Edward Howell to create a resulting trust in his own favor, but, on the contrary, it is manifest that a gift was intended, we cannot agree that any resulting trust in favor of Edward Howell arose, whereby he was invested with an equitable title to the property. If, then, Edward Howell never had any estate either legal or equitable in the property, we do not see how it is possible for him to claim the exemption allowed in *such property*, and hence we think the Circuit Judge erred in holding that he would be entitled to a homestead exemption in the house and lot to the extent of one thousand dollars—the amount allowed in property of that character.

The remaining inquiry is, whether Edward Howell is precluded from claiming the personal property exemption to the extent of five hundred dollars (if otherwise entitled thereto), by reason of the fact that he gave the purchase money of the house and lot to his wife, in fraud of the rights of his creditors. When it is remembered that the only reason why the plaintiff has a right to subject the property in question to the payment of his debt, is the fact that the funds of his debtor, which he had a right to have applied to the payment of his debt, have been used in the purchase of the property, it would seem to follow necessarily that, if the creditor had no right to have the whole or any part of such funds applied to his debt, he could not follow the funds, or so much thereof as were beyond his reach while in the hands of the debtor, after they had been invested in the property. Hence if any part of the purchase money shall prove to be necessary to make up Edward Howell's personal property exemption (provided he is otherwise entitled to such exemption), the plaintiff has no more right to subject such part of the purchase money to the payment of his debt, than if the same had remained in the hands of his debtor. There can be no fraud, either actual or constructive, in a debtor putting beyond the reach of the ordinary process of law funds or property which by law are exempt from the payment of debt, for the reason that the creditor is not thereby deprived of any right or impeded in the enforcement of it. See 1 *Story Eq. Jur.*, section 367.

This question, so far as we are informed, has never been decided in this State, but it has been the subject of judicial deci-

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sion elsewhere, and the very decided weight of authority is in favor of the view which we have adopted. In *Derby v. Weyrich* (8 Neb., 174, reported also in 30 Am. Rep., 827), it was held that land purchased with property exempt from the payment of debt, and conveyed to the debtor's wife, could not be subjected to the payment of his debts, the court saying: "The right of the defendant in error (the creditor) to have the land sold and applied to the payment of his debt, if he have any, must be founded upon his right to the fund with which it is purchased. As he had no right to the fund, it having been placed beyond his reach by the law, he has no right to disturb the possession of the land in the hands of Ida H. Derby," who was the wife and donee of the debtor. See also the case of *Ruohs v. Hooke*, 3 Lea (Tenn), 302, reported also in 31 Am. Rep., 642, and especially, as reported in a note to that case, the opinion of Staples, J., in *Boynton v. McNeal*, 31 Gratt. (Va.), 456.

What we have said relates only to the right of the creditor to subject so much of the purchase money of the house and lot as may be necessary to make up Edward Howell's personal property exemption, to the extent of five hundred dollars, provided he shall prove to be otherwise entitled to the same, and is not designed to conclude any claim which Margaret E. Howell may set up against her husband to so much of the purchase money as may prove to be exempt under his gift to her. So far as appears, she makes no such claim and we decide nothing in reference to it.

As to the third ground of appeal<sup>1</sup> taken by defendants, it is sufficient to say that no such question appears to have been presented to or decided by the court. There was no demurrer for defect of parties, and no application requiring plaintiff to amend by bringing in other creditors. Indeed, it does not appear that there are any other creditors, though it does appear that plaintiff is the only judgment creditor.

The judgment of this court is, that the judgment of the Circuit Court be modified in accordance with the views herein announced,

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<sup>1</sup>"That his honor erred in holding that the net proceeds of the suit should go to the plaintiff instead of to such creditors as should be called in and allowed to prove claims and share expenses."

and that the case be remanded to that court for such further proceedings as may be necessary to carry into effect such views.

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CROMER v. BOINEST.

1. A paper purporting to be a decree, rendered by one who is not a judge either *de jure* or *de facto*, is an absolute nullity, and may be so treated wherever met with. It would, therefore, present no questions proper to be considered by this court on appeal.
2. A decree of a court becomes operative as such from the time it is handed to the proper officer to be filed, and not from the time that the judge signs and dates it.
3. A Circuit Judge in this State holds his office "for a term of four years" only, and not thereafter until his successor is elected and qualified. After the expiration of that term, he is no longer a judge *de jure*.
4. A Circuit Judge during his term of office heard a case, and wrote, signed, and dated his decree, but did not file it until his term had expired, he and all parties concerned being at the time ignorant of that fact. A few days afterwards he was re-elected for another term, and at a special court subsequently convened he called this case for the purpose of re-signing his decree as of that date, as he did in other cases, but upon objection of the plaintiff to his considering the case then, he did not change the date, but returned the decree to the clerk. *Held*, that this was a valid decree of the court: (1) because the judge was a judge *de facto* when the decree was first filed, and (2) because the subsequent returning of the decree to the clerk was equivalent to a re-filing, if necessary, as of that date, even though not re-signed or re-dated, not ordered to be re-filed nor so marked. MR. CHIEF JUSTICE SIMPSON *dissenting*.
5. Upon the death of A intestate, his widow administered and filed her bill for the settlement of his estate, and creditors were called in. Two creditors presented claims—R a judgment and S a sealed note, upon which C was a surety. Afterwards R assigned to C so much of her judgment as would pay the S note, and C gave notice to the widow of his assignment. Some months later, the lands were sold and bid in by R for an amount less than was due on her judgment, but she took no deed. A year afterwards the court ordered all the estate (which was insufficient to pay R) to be turned over to R, and titles to the land, by R's direction, to be made to the widow for life, with remainder to her issue—all of which proceedings were known to C, although no party to the record. Five years afterwards C paid S, and a year later

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brought this action to subject this land to the payment of his claim under his assignment. *Held*, that he could not recover

6. The purchaser at the judgment sale took the land freed from the claims of all creditors of the intestate, and a creditor could only thereafter look to the proceeds of sale; and under the circumstances, Mrs. R's purchase was complete without a deed—particularly when this was in effect affirmed by a decree of the court.
7. If the rights of C were ignored in these proceedings, it was the result of his own fault and *laches*; but his only right was against the proceeds of the sale, and not against the land itself.

Before FRASER, J., Newberry, November, 1886.

The opinion fully states the case.

*Mr. J. F. J. Caldwell*, for appellant.

*Mr. T. S. Moorman*, contra.

October 29, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. The question of jurisdiction raised by this appeal is one of the gravest importance, and must necessarily be first determined before any of the other questions presented can be properly considered. For if Judge Fraser, when he rendered the decree appealed from, was neither a judge *de jure* nor *de facto*, then it is quite clear that the paper styled a decree is an absolute nullity, and cannot present any question proper to be considered by this tribunal; and if it is an absolute nullity, then all the so-called decrees and judgments rendered by Judge Fraser, as well as every official act done by him after the termination of his term of office and before his re-election, are likewise nullities, and may be so treated wherever met with. This gives the question presented for determination far-reaching consequences of such a serious and important character as to demand the most thorough and careful consideration.

The facts out of which the question of jurisdiction arises are few and undisputed, and may be stated as follows: the case in which the alleged decree was rendered was heard on November 30, 1886, during a term of the court commencing November 8, 1886, and held continuously until and including December 6, 1886, on



which day the alleged decree was dated and filed, which was the first announcement or publication of the same, though it was actually prepared and written out prior to December 2, 1886—the day on which Judge Fraser's term of office expired. He was, however, re-elected a few days after December 6, 1886, and after his re-election, at an extra term of the court, held on December 31, 1886, he "called this case for the purpose of re-signing his decree as of that date, as he did in other cases, but upon objection of the plaintiff to his considering this case then, he did not change the date, but returned the decree to the clerk." Upon this state of facts there can be no doubt that at the time the decree in question was originally filed and announced, Judge Fraser was not a judge *de jure*, inasmuch as he was then out of office by the expiration of the term for which he was elected, and the important inquiry is, whether he was a judge *de facto*; for the mere fact that Judge Fraser had prepared and written out his decree before the expiration of his term of office cannot affect the question.

The question as to what will constitute a *de facto* officer has been the subject of judicial inquiry in very many cases, both in England and in this country; and while it must be admitted that there is some conflict of opinion, it seems to us that the weight of authority, as well as argument, is against the view contended for by the appellant. According to that view, as we understand it, the mere fact that one is found in the exercise of the duties of an office, without question of his authority as such, is not sufficient to constitute him a *de facto* officer, unless he is in such office by some color of right or title, even though he may be apparently invested with all the insignia of office.

The *de facto* doctrine rests upon considerations of public policy and necessity. It was introduced into the law for the purpose of protecting the interests of the public as well as those of private individuals, where those interests were involved in the official acts of one who may be found exercising the duties of an office, though without lawful authority. Hence where a person is called upon to deal with such an officer, he is not bound to inquire whether his title to the office is good, and for a like reason it seems to us that he should not be required to inquire

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whether such title is colorable. In fact, he is not called upon to inquire into the title of such an officer at all, but may safely assume that he is what he appears to be, and what the public generally regard him to be. As is said by Devens, J., in *Petersilea v. Stone* (119 Mass., 465;—S. C., 20 Am. Rep., 335): "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election."

The case of *The State v. Carroll* (38 Conn., 449;—S. C., 9 Am. Rep., 409), seems to be a leading case upon the subject. There, Butler, C. J., subjects the authorities, both English and American, to an elaborate review, and shows that the idea that there must be some color of right, derived from some election or appointment, in order to constitute one a *de facto* officer, is without foundation, and is based upon what he characterizes as "a brief, inaccurate, and deceptive report" of the case of *Rex v. Lisle* (2 Strang, 1090), as is shown by a fuller and more accurate report of the same case in *Andrews*, 163. On the contrary, he adopts the definition of a *de facto* officer, given by Lord Ellenborough in *Rex v. Bedford Level* (6 East., 356), generalized from a previous definition given by Lord Holt, in *Parker v. Kett* (1 Ld. Raym., 658), as follows: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law," which definition, he says, "has never been questioned since in England, and is now the rule there."

Without undertaking to go over all the cases cited in this elaborate opinion, it will be sufficient to refer to some, which seem to be more directly applicable to the question now under consideration. In *Knowles v. Luce* (Moore, 109), Manwood, J., is reported as saying, "that an officer continuing to exercise an office after his time had expired was a good officer *de facto*." In *Rex v. Bedford Level*, *supra*, the question was whether a deputy recording officer, who continued to act after the death of his principal, was an officer *de facto*; and the court, laying down the definition of such an officer, as hereinbefore given, held the acts of the deputy to be good until the death of the principal was

known, but not afterward, because after the death of the principal became known there was no longer any reason for the public to suppose that the deputy had authority to exercise the duties of the office, inasmuch as his appointment necessarily terminated with the death of his principal.

That case is, in principle, identical with the case under consideration; for Judge Fraser's legal authority as a judge undoubtedly terminated with the expiration of his term, on December 2, 1886, just as the legal authority of the deputy in *Rex v. Bedford Level*, terminated with the death of his principal, and if the acts of the deputy after such termination, and before the fact which gave rise to it was known, were valid, surely the acts of Judge Fraser after the termination of his office, and before such fact was known, would also be valid. When it became known that Judge Fraser's term had expired does not appear on the record, and it surely was the duty of appellant, if his appeal depends upon that fact, as we think it does, to make it appear; for certainly the court could not assume that Judge Fraser would undertake to exercise any of the functions of his office after his term had expired. On the contrary, the court, it seems to us, would much more readily assume, what was no doubt the fact, that all parties, as well as the judge himself, were in ignorance of the fact that his term had expired when the decree was originally delivered to the clerk to be filed.

In *Wilcox v. Smith* (5 *Wend.*, 231; 21 *A. D.*, 213), the question was, whether a person acting as a justice of the peace could be regarded as a *de facto* officer. It seems that he was reputed to be a justice of the peace, and had acted as such for three years—for the first year the town in which he resided was a part of the County of Genessee, and for the last two years it was a part of the County of Orleans. It was shown that he had not been appointed by the officers of the County of Orleans, nor did it appear that he had ever been appointed by the officers of the County of Genessee, though it was shown that he took the oath and acted as a justice while the town was a part of the County of Genessee. The court below charged the jury that there being no color of title by election or appointment, the process issued by him was absolutely void. But on appeal this

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ruling was reversed, the court holding that where the interests of third persons were involved, and for the protection of such interests, the acts of the officer must be validated as those of a *de facto* officer, even though no color of election or appointment had been shown.

In *Gilliam v. Reddick* (4 Ired., 368), the question was, whether an official act done by the register of Gates County, *after the expiration of his term of office*, was valid, and the court held that it was. In that case, like the present, the register was appointed for a fixed term of four years, without any provision for holding over. In that case the court refers to the previous case of *Burke v. Elliott*, in the same volume, in which the court said there must be at least some colorable election and induction into office *ab origine*, in order to constitute one a *de facto* officer, or so long an exercise of the duties of the office, and acquiescence therein by the public authorities, as to afford the individual citizen a strong presumption that the officer was duly qualified to act.

In *Brown v. Lunt* (37 Me., 423), the question was, whether the official act of a justice of the peace, done after his term of office had expired, could be sustained as the act of a *de facto* officer, and it was held that it could. In that case the justice was appointed for one year, without any provision for holding over. He had been a justice for many years in succession, was not re-appointed, but continued to act, and took the acknowledgment of a deed about two years after his term of office had expired. One of the grounds upon which this decision seems to have been placed, although others are also stated, seems to have been that the fact of the justice having been originally lawfully appointed, his continuing to exercise the duties of the office without question, after the expiration of his term of office, afforded such color of right as seems to be required by some of the cases in order to constitute a *de facto* officer. The same principle seems to have been recognized by the Supreme Court of the United States in *Cocke v. Halsey*, 16 Peters, 71.

It will be observed that this ground is especially applicable to the case in hand. It is conceded that Judge Fraser was originally lawfully elected and duly qualified as judge, and that he had been for many years in the lawful exercise of the duties of that

office, and was so at the time this case was heard by him, and this may be regarded as affording such color of right as seems to be thought necessary by some to constitute a *de facto* officer. It is true that it seems somewhat paradoxical—not to use the stronger term employed by the distinguished judge in the opinion from which this is largely drawn—to say that an appointment to an office for a specified term, can afford any color of right or title to such office for a longer period than the term specified, yet when we consider the origin and foundation of the *de facto* doctrine, and that it was introduced for the purpose of protecting and preserving the interests of those who have been induced to submit their rights to one who has the apparent authority to determine them, the paradoxical character of the expression which the terms used, considered apart from the subject to which they are applied, might seem to imply, will disappear.

Now while, strictly speaking, an appointment to an office for four years cannot well be considered as conferring even color of title for any longer period, yet it may well be so regarded in the connection and for the purpose for which the words—color of right or title—are used in discussing this subject. As we understand it, those words are used to mark sharply the line between one who intrudes himself into an office without any shadow of right—a mere usurper—and one who enters upon an office or continues in it under an honest, though mistaken, belief of his legal right so to do, shared in by the public. It seems no more paradoxical to say that one who continues in the discharge of the duties of an office to which he has been legally elected or appointed, after his term had expired, in ignorance of that fact, is being in said office under color of right, than it is to say that one who exercises the duties of an office under an appointment not authorized by law, though supposed to be so, does so under color of right; and yet it has been held in this State (*Taylor v. Skrine*, 3 *Brev.*, 516), as well as elsewhere, that one who is in office by virtue of an election or appointment afterwards declared to be unconstitutional, is in such office under color of right, and therefore his official acts are valid as those of a *de facto* officer. Now if, as in the case just cited, the act authorizing the appointment was unconstitutional, it was absolutely null and

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void, and therefore could confer no authority whatever to hold the office, and at most was only *supposed* to do so; and this was what gave the color of right which invested the judge, whose official act was there brought in question, with the character of a *de facto* officer.

The same principle applies with increased force to the case of Judge Fraser. It is conceded that he was in office originally by legal authority, and the act which is now brought in question was done by him under the belief, shared in by the public, which afterwards proved to be a mistake, that such authority still continued. It was therefore done because of an authority originally legal, which, however, was mistakenly supposed still to exist, and it may, therefore, be said to have been done under color of such authority; for it cannot be doubted that Judge Fraser never would have undertaken to exercise the duties of an office after he knew that his term had expired, and his authority so to do had terminated. His act must, therefore, be referred to such authority, as done by reason of the belief that such authority still continued, that such authority was the color of right under which he acted. If, as in *Taylor v. Skrine*, an appointment to an office without any legal authority whatever, should be regarded as sufficient to invest the appointee with color of right to the office, solely because it was honestly, though erroneously, supposed that the appointment was lawful, surely an appointment originally made by lawful authority, and honestly, though erroneously, supposed still to continue, ought to be sufficient for the same purpose.

In *Sheehan's Case* (122 Mass., 445; S. C., 23 Am. Rep., 374), the accused having been convicted before the police court, applied to be discharged under a writ of *habeas corpus*, resting his claim upon the ground that Hawkes, the justice before whom he was tried, was disqualified to hold the office under the constitution of Massachusetts, by reason of the fact that he had accepted a seat in the legislature. Gray, C. J., in delivering the opinion of the court, used this language: "But if Mr. Hawkes, upon taking his seat in the house of representatives, ceased to be a justice *de jure*, he was, by color of the commission which he still assumed to hold and act under, having the usual signs of judicial office—sitting in the court, using its seal, and attended by

its clerk—and no other person having been appointed in his stead, a justice *de facto*.” This language may very appropriately be applied to the present case, *mutatis mutandis*.

In *Petersilea v. Stone*, *supra*, the question was whether the service of certain process by one who had previously been appointed constable, but whose term of office had expired, and nevertheless continued to act, was valid. The court held that it was, the constable being a *de facto* officer, using the language hereinbefore quoted from the case. It is now again cited for the purpose of saying that it distinctly repudiates the idea that in order to constitute a *de facto* officer, he must have some color of right, arising from some election or appointment, and declares that the general terms used in the previous case of *Fitchburg Railroad Co. v. Grand Junction Railroad Co.* (1 Allen, 552), from which such an idea might be inferred, must be confined to that particular case, and cannot be regarded as stating fully and accurately the elements necessary to constitute a *de facto* officer.

In this State there does not seem to be any authoritative decision on the point under consideration. But there are judicial utterances which seem to us to be in accordance with the view herein presented. In *McBee v. Hoke* (2 Speer, at page 145), O'Neill, J., in discussing this subject, uses this language: “But I take the broad ground, that being found in an office, of which he had been the incumbent for many years, the plaintiffs had the right to regard him as coroner, and his acts for them are good.

\* \* \* One in office and transacting its duties is supposed to be rightfully there, and, so far as third persons are concerned, that presumption legalizes his acts.” It is true, as said by Evans, J., in the subsequent case of *Kottman v. Ayer* (3 Strob., 92): “These propositions, although not absolutely necessary to be affirmed in that case, and which may be supposed to be mere *dicta*, I propose to show are supported by all the authorities.” This, too, may also be regarded as a mere *dictum*, inasmuch as the question involved in *Kottman v. Ayer* did not necessarily call for such a declaration of opinion. But when we find two such distinguished judges uniting in thus laying down the general doctrine of a *de facto* officer, no small support is afforded the view herein adopted.

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It seems to us, therefore, that Judge Fraser must be regarded as a *de facto* judge on December 6, 1886, when the decree was originally filed in the clerk's office, and consequently that the decree must be regarded as a valid decree of the Court of Common Pleas.

But there is another ground upon which the validity of this decree may be sustained. There can be no doubt that, the case having been heard and considered before the judge's term had expired, it would have been entirely competent for the judge to have retained the papers during the interval between the expiration of his first term, and his re-election to his second term, and after such re-election filed his decree in the proper office, which would then unquestionably have been a valid decree; and there is as little doubt that he might, instead of retaining the papers, together with the decree, in his own possession, have left them in the custody of the gentleman who held the office of clerk until his return, after his re-election, and then formally delivered the decree to the clerk to be filed, and that such decree would then have been a perfectly valid decree.

Now, do not the facts stated in the "Case" show that he, in effect, did this? As we have seen above, it is there stated that when he returned, after his election to the extra court, he "called this case for the purpose of re-signing his decree as of that date, as he did in other cases, but upon objection of the plaintiff to his considering the case then, he did not change the date, but returned the decree to the clerk." There certainly was no necessity for the judge to re-sign the decree, or change its date, nor was there any need for "his *considering* this case then," as it had already been fully considered and his conclusions committed to writing before his previous term had expired. There was literally nothing for him to do, except what he did do—place the decree in the hands of the clerk, whose duty it was then to have marked it filed. True, it is not stated in the "Case" that the judge directed the clerk when he returned the decree to him to mark it filed, but this surely was not necessary. Nor does it appear that the clerk did then mark it filed, but this was not essential to the validity of the decree, as is fully shown by the case of *Clark v. Melton* (19 S. C., 498), as such omission may be corrected at



any time. The case was heard and determined by a judge holding a valid commission, and his decree is now found in the proper office, placed there by one having lawful authority so to do, and even if it should be conceded that it was originally placed in the office without any lawful authority, and has never been properly marked "filed," its validity cannot now be questioned.

Having determined that the decree rendered by Judge Fraser in this case a few days after his term of office had expired, and shortly before his re-election, was not thereby rendered invalid, it becomes necessary to inquire whether there are any such errors in that decree as are imputed to it by the appellant in his exceptions.

The facts necessary to a proper understanding of the points raised by the exceptions are substantially as follows: In September, 1871, T. S. Boinest died intestate, seized and possessed of some personal estate and of a tract of land containing three hundred acres, more or less, leaving as his heirs at law his widow, Ann E. Boinest, one of the defendants in this action, and four children, who are the other defendants herein. The widow having administered on the personal estate of the intestate, on September 23, 1873, instituted proceedings in the Court of Common Pleas for the settlement of the estate, asking, amongst other things, that the assets be marshalled and creditors called in and required to establish their demands. Under the call for creditors, only two claims appear to have been established, one a judgment in favor of Elizabeth Rikard, the mother of Ann E. Boinest, amounting to something over eight thousand dollars, and the other a sealed note to one Christian Suber for the sum of \$634.57, payable one day after date, and dated July 7, 1869, upon which note the plaintiff herein was the surety of the intestate.

The judgment in favor of Mrs. Rikard having precedence over other debts, no money was ever ordered to be applied to the Suber note, the amount of the judgment being greater than the ascertained value of the whole estate. On November 8, 1875, Mrs. Rikard, in consideration of her connection with intestate as his mother-in-law, assigned to the plaintiff herein so much of the judgment in her favor as would be sufficient to pay the Suber

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note, upon which, as stated, the plaintiff was intestate's surety, and on the same day Mrs. Ann E. Boinest received due notice of such assignment. Shortly after this assignment was executed, and before December 14, 1875, it was placed by the plaintiff in the hands of an attorney, who was then employed to take care of plaintiff's interests in the premises.

By virtue of an order of the court, made in the proceeding to marshal the assets of intestate's estate, the land was offered for sale on the first Monday in January, 1877, and bid off by Mrs. Rikard for the sum of twenty-three hundred dollars, the terms of sale being one-third cash and the balance on a credit of twelve months. Mrs. Rikard made no payment in money, and gave no obligation for the purchase money, but in September, 1878, the referee made his report, recommending that the balance of the personal estate, after the payment of costs and a special lien upon the life insurance fund of the intestate, together with Mrs. Boinest's claim of dower, should be turned over to Mrs. Rikard on account of her judgment, the amount of which was more than sufficient to absorb the whole estate, including the land; and as to the land, he recommended the adoption of a proposition made by Mrs. Rikard, in writing, to the effect that title to the land be made to Mrs. Boinest for life with remainder to her issue. This report was confirmed in February, 1879, and accordingly on March 21, 1879, the clerk of the court made a deed for the land to Mrs. Boinest for life and after her death to her issue, under which defendants have ever since been in possession.

These proceedings for the settlement of the estate of the intestate, as well as the sale of the land, were known to the plaintiff and his attorney, but no steps appear to have been taken for the protection of plaintiff's interests under the assignment, except that some time in 1879, but at what precise date is not stated, the attorney for plaintiff exhibited the assignment to the executors of Suber, and notified McCaughrin, who had by agreement become the receiver of the insurance fund, not to pay out the money, and said executors procured an order subrogating them to the rights of the plaintiff under his assignment and received a portion of that fund, amounting to something over five hundred dollars. Prior to this the said executors had obtained judgment

on the sealed note against Cromer, and on February 5, 1884, Cromer paid the balance due on said judgment, after deducting the amount received from the insurance fund, as aforesaid, which balance amounted to something over nine hundred dollars.

On March 20, 1885, this action was commenced, whereby the plaintiff seeks to subject the land to the payment of the balance of the Suber debt, which the plaintiff has been compelled to pay as the surety of the intestate. The Circuit Judge held that under the foregoing facts the plaintiff had made no case warranting the interposition of the court in his behalf, and therefore rendered judgment dismissing the complaint. From this judgment plaintiff appeals upon the several grounds set out in the record, which need not be repeated here.

We think that the conclusion reached by the Circuit Judge was clearly right. There can be no doubt that where the lands of an intestate, covered by the lien of a judgment, are sold by order of the court under proceedings to marshal assets, to which the judgment creditor was a party, the purchaser at such sale takes the land free from the lien of the judgment, and the only recourse of the judgment creditor is upon the proceeds of the sale. So that the real inquiry here is whether the land in question has been so sold. As to this we do not think there can be any question. The sale was undoubtedly ordered by a court of competent jurisdiction under a proceeding in which it had before it all the necessary parties, and under such order the land was offered for sale and bid off by Mrs. Rikard at an amount much less than the amount of her judgment, to which it was clearly ascertained that the proceeds were applicable. The fact that she did not comply in a formal manner with the terms of the sale by paying the cash portion of the purchase money and executing her obligation for the credit portion, certainly cannot affect the question. As she was the only party before the court entitled to the proceeds of the sale, it would certainly have been a wholly unnecessary formality for her to pay over the money with one hand and receive it back with the other.

But, when, in addition to this, we find that the course actually pursued was recommended by the referee as a practical compliance with her bid, and that such recommendation was adopted

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and confirmed by the court, there cannot be a doubt that the sale was just as effectual as if Mrs. Rikard had, in the most formal manner, complied with the terms of the sale by paying the one-third in cash and giving her obligation for the balance. If she had done so, she certainly would have been entitled immediately to receive back again the cash payment which she had just made on her judgment, and would, no doubt, have obtained an order for the cancellation of her bond for the credit portion by receipting for its amount on the judgment which had been established in her favor, and then clearly she could have made titles to Mrs. Boinest and her issue, which would have been free from the lien of the judgment for the balance still due upon it. This, it seems to us, was what was, in effect, done under the express sanction and order of the court; and, therefore, we think that the defendants took the land free from the lien of the judgment, and it cannot, in their hands, be subjected to the payment of any claim the plaintiff may have, unless, after establishing his claim against Mrs. Rikard, if he has any, and pursuing her, or her estate to insolvency, he may be able, under proper proceedings for the purpose, to set aside the conveyance to the defendants as a voluntary conveyance to them by Mrs. Rikard.

But it is said that in all these proceeding the rights and interests of the plaintiff were wholly ignored. Even granting this to be so, the pertinent inquiry would be, whose fault was it, that such was the case? It will be remembered that any interest which the plaintiff may have acquired, under the assignment from Mrs. Rikard, was acquired pending the action under which the sale, now sought to be impeached, was made; and if the plaintiff neglected to take care of his own interests, he has no one but himself to blame. Both he and his counsel had not only constructive notice arising from the pendency of the action, but the evidence conclusively shows that they had actual notice of what was going on, and yet no step appears to have been taken to protect his rights, or even to bring the fact to the attention of the court that he had, or claimed to have, any interest whatever in the proceedings. But were the rights, which he is now seeking to set up, improperly ignored? Even if he had been made a party to the action, at the time the assignment was executed, he

could not have set up any claim to the land, or a lien thereon. His only claim would have been to the proceeds of the sale, to the extent necessary to satisfy his assignment, and that he omitted to make at a time when the court could have provided for such claim; and if, by his *laches*, the proceeds of the sale have been improperly applied, that gives him no right to go upon the land, which has been legally sold and conveyed to the defendants, who, perhaps, as is alleged, have made expensive improvements upon the land, in confident reliance upon the title made to them by order of the court.

It is contended, however, that until the plaintiff paid the debt upon which he was the surety of the intestate, "he had no *status* which enabled him to claim anything from the Boineest estate, real or personal." This does not seem to have been regarded as an insurmountable obstacle when the order was obtained subrogating the executors of Suber to the rights of Cromer, whereby the plaintiff was relieved from the payment of nearly one half of the debt; for that must have been obtained before the plaintiff paid any part of the debt, as he only claims to have paid the balance due, after deducting the amount received under such order. If the fact that the plaintiff had not paid the debt for which he was surety, was not then found to be any obstacle to an application for the recognition and protection of his rights under the assignment, it is not apparent why it should have been so when the court was proceeding to dispose of the proceeds of the sale of the land. Indeed, we cannot doubt that if the assignment had then been brought to the attention of the court in any way, some proper provision would have been made for the protection of the rights of the assignee.

But even assuming that the plaintiff could not before payment of the debt take any step to protect his interests under the assignment, which, however, we are not prepared to admit, then the inquiry would be, who was responsible for the delay? If the plaintiff delayed payment of the debt until urged to do so by the process of law, and in the meantime property or funds which he might have, otherwise, subjected to such payment, has got beyond his reach, the consequences of such delay must fall upon him and not upon others who were in no wise responsible therefor. It does

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not seem to us, therefore, that, in any view of the case, the plaintiff can subject the land, in the hands of the defendants, to the payment of the amount which he has been required to pay as surety for the intestate.

Whether the plaintiff has any claim against Mrs. Rikard, or her estate (for it is stated in the "Case" that she is dead), for the amount of the proceeds of the sale which, in effect, were improperly received by her, in derogation of the rights of her assignee, we have not undertaken to consider. Her representative is not before the court, and it would not be proper for us even to intimate any opinion as to that question.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

MR. JUSTICE MCGOWAN. The doctrine which sustains a decree between parties by a *de facto* judge, may seem at first view to be somewhat illogical; but it was originally adopted from the necessity of the case, and, as I think, is now well established. Any other rule would tend to unsettle the administration of the law, and render uncertain titles to property.

MR. CHIEF JUSTICE SIMPSON, *dissenting on the question of jurisdiction involved*. Not being able to concur in the majority opinion on the question of jurisdiction, I have filed a dissenting opinion as to that. I concur, however, in the majority opinion on the merits.

Inasmuch as the first question which presents itself in this case, is a question of jurisdiction upon which I think the appeal should be dismissed, it will not be necessary to state the general facts of the cause, or to discuss the questions arising thereon. It will only be necessary to state the facts upon which the jurisdictional question depends. The case was heard at the November term of the Court of Common Pleas, for Newberry County, 1886. This court was held continuously from November 8, 1886, till December 6, inclusive, Judge Fraser presiding, whose term of office expired on December 2. He was re-elected some time after this; so that there was an interval of        days between the expiration of his previous term, December 2, and his re-election.

The case below was heard before December 2, but the decree was dated and filed on December 6, during the interval, though it is stated in the "Case" that it had been written before the 2nd. The question upon these facts is, can this be regarded as a decree of a court? If not, there has been no judgment from which an appeal can be brought here, as we are only authorized to entertain appeals from judicial tribunals, and to correct errors at law of judicial officers.

It is admitted that the decree, though dated and filed after the expiration of Judge Fraser's term, was written before. Now, the question arises, and it is the first question in order—did the fact of its being written before, make it the decree of the court at that time and entitle it to be filed afterwards? In other words, when does a decree become the judgment of a court? Does it become so at the time it may have been prepared in the chamber of the chancellor, or when announced and filed in the proper office? It is well established, that a decree can have no lien on property until filed in the proper office, and it would seem, therefore, that so far as third parties are concerned, at least, until said filing there is no decree. But we have been referred to no case, nor have we found one ourselves, involving this precise point here, so that in adjudging it, having no aid from previous cases, either authoritative or otherwise, we must determine it according to our view of the construction to be given to the terms, decree and judgment.

A decree is defined to be, "to determine," "to order," "to determine judicially and decisively." And a judgment is the final determination of the rights of the parties in the action. Now, it appears to us, that nothing can be said to be determined decisively and finally by a judge until his determination is announced and promulgated. Up to that time, whatever may be the conclusion of his own mind, this conclusion is subject to change and alteration. Previous to promulgation there can be no order, nor can parties take notice thereof, or be bound thereby. And certainly while it is in the breast of the judge it can have no effect whatever. It can neither be assailed, set aside, enforced, nor enjoined, for the reason that it has no existence.

It is conceded that the term of Judge Fraser of which he was

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in possession at the time the cause was heard had expired when his decree was filed, and that at that time he had not been re-elected. He was not, therefore, a judge *de jure*. Was he a judge *de facto*? In the case of *Kottman and Wife v. Ayer* (3 *Strob.*, 92), the old Court of Appeals fully discussed the question of officers *de jure* and *de facto*, citing all the cases decided up to that time. That was a case in which a magistrate had taken a relinquishment of inheritance by a married woman, after he had been appointed, but before he had qualified; in fact, he never qualified under this appointment. The court held the relinquishment valid, because the magistrate was at least a *de facto officer*, on the ground that he was in office by appointment, and was actually discharging the duties thereof, thus coming under the general principle, which the various cases cited in the opinion sustained, to wit: that where the electing or appointing power has conferred the office on one, and he is in the actual discharge of its duties, without his title being questioned in any legal way, the community in which he lives have a right to regard him as a legal officer, and his official acts as to them are valid, the court, in substance, saying that where the usual evidences of official right are united, viz., appointment to and the actual discharge of the duties of the office, the acts of the officer as to third parties are valid, because he is a judge *de jure*, if his appointment was legal and he had qualified, and at least *de facto*, even if his appointment was insufficient, yet affording a color of right. And this seems to be the result of all the cases referred to in that opinion, and of all the cases that we have been able to find, to wit: a *de facto*, as distinguished from a *de jure*, officer is one in office under some color of right, either an appointment, or an election, or in some way by an authority claimed to have been exercised in his behalf, and then actually discharging the duties thereof, in whole or in part.

It is true that in some of the cases general phrases have been sometimes used, which, if construed literally, would include all those who were actually discharging the duties of the office, whether he had any color of right thereto, by a claimed appointment or election, or not. But upon an examination of the decided cases in which the officer has been held to be a *de facto* one, it



will be found that he was in office by virtue of some appointment which was claimed to afford a colorable right at least. The case of *Kottman v. Ayer*, *supra*, cites many cases on this subject, including several marking the exceptions to the doctrine herein, and as we have said, in some of them strong expressions are found extending the *de facto doctrine* to those in the exercise of an office whether under color of right or not. For instance, O'Neill, J., in *McBee v. Hoke* (2 *Speer*, 145), said: "But I take the broad ground, that being found in an office, of which he had been the incumbent for many years, the plaintiff had the right to regard him as coroner, and his acts for them are good. \* \* \* One in office and transacting its duties is supposed to be rightfully there, and, so far as third persons are concerned, that presumption legalizes his acts." And Evans, J., in *Kottman v. Ayer* (3 *Strob.*, 92), in referring to these propositions laid down by O'Neill, J., said: "These propositions, although not absolutely necessary to be affirmed in that case and which may be supposed to be mere *dicta*, I propose to show are supported by authority." And in the case of *Ex parte Norris* (8 *S. C.*, 473), Willard, A. J., said: "That to constitute an officer *de facto*, he must have a presumptive or an apparent right to exercise the office, resulting from either full and peaceable possession of the powers of such office, or reasonable color of title, with actual use of the office."

Upon an examination, however, of the facts in the cases in which these expressions were used, it will be found that in each the officer was in possession of the office in question by some color of right, either appointment or election, and, therefore, the question considered was not really involved. Hence these propositions must be regarded as mere *dicta*. But, be that as it may, and assuming that the law as announced in these broad propositions is the true doctrine on this subject, was Judge Fraser in the full and peaceable possession of the office to the duties of which the filing of the decree in controversy belonged, so far as the parties litigant are concerned, at the time when he filed said decree? It is conceded that at that time his term had expired, and the office was actually and legally vacant. Now, if with a knowledge of this fact, and with the acquiescence of these litigants,

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he had gone on and exercised the functions of a second term, then perhaps it might be said that he was in the full and peaceable possession of the powers of said second term, to which he was afterwards elected, and under the principle announced above by Willard, A. J., he might be regarded as a *de facto* judge at that time. But these are not the facts. On the contrary, Judge Fraser overlooked the fact that his term had expired on December 2, and he filed the decree as of that term, the parties litigant not being present, and not acquiescing in any way in such filing. It does not seem to us that in the exercise of a single judicial function like this and under these circumstances, that it can be rightfully said that he was in the full and peaceable possession of the powers of the office to which his act belonged, to wit: the second term, and that such should bind parties who were not present, and who in no way contributed to it.

In the case of *Wilcox v. Smith* (5 *Wend.*, page 234; 21 *A. D.*, 213), Sutherland, J., said: "It will be observed that these cases \* \* \* do not go upon the ground that the claim by an individual to be a public officer, and his acting as such, is merely *prima facie* evidence that he is an officer *de jure*, but the principle they establish is, that an individual coming into office by color of an election or appointment, is an officer *de facto*, and his acts in relation to the public or third persons are valid until he is removed, although it be conceded that his election or appointment was illegal. His title shall not be inquired into. The mere claim to be a public officer, and the performance of a single, or even a number of acts in that character would not perhaps constitute an individual an officer *de facto*. There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment." The above as it appears to me is the correct doctrine. And I do not see how it can be said that Judge Fraser was in the possession of the vacant office to which his decree belonged, and that the public had acquiesced in this, when neither he nor the public knew that said office was vacant, and when, instead of claiming the new term, he supposed that his

previous term had not expired, and the filing of the decree was by virtue of his powers incident to that term.

I conclude, that the previous term of Judge Fraser having expired when he filed the decree, the filing could not attach to that term, nor could it be referred to the second term, because at that time he had not been re-elected, nor was he claiming to exercise its duties by any color of title nor by actual possession of the vacant office. He was, therefore, neither a *de facto* nor a *de jure* officer. The case of *The State v. Anone* (2 Nott & McC., 30), relied on by the respondent to the position, that no objection having been made at the trial, none can be made now, does not apply here. Judge Fraser had the right to hear the case, because at the hearing his office had not expired, and the appellant, therefore, could not have objected then, and after the decree was filed, it was too late to object. It seems, however, that when Judge Fraser returned after his re-election, to hold an extra court, and some proposition was made to sign and promulgate the decree, the appellant did then object.

It being my opinion that Judge Fraser was neither a *de facto* nor *de jure* judge at the time the decree in question was filed, it follows that said alleged decree, in my opinion, is not the judgment of a court, and, therefore, is not within the jurisdiction of this court on appeal, upon its merits.

Judgment affirmed.

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BRIDGER v. ASHEVILLE & SPARTANBURG R. R. COMPANY.

1. In action by a father against a railroad company to recover damages resulting from injuries received by his son, a lad of ten years of age, while playing on an unlocked turn-table of defendant, testimony is admissible as to the lad's intelligence and his capacity to know and understand the danger, but not as to his prudence or recklessness in encountering it.
2. Evidence offered by plaintiff of former accidents upon this same turn-table was properly excluded—knowledge of such accidents not having been brought home to defendant.
3. The father having nursed his boy while suffering from the injuries

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received, the judge charged the jury that contract wages lost by the father while so nursing was a proper element in the measure of damages, but that speculative and uncertain earnings were not. *Held*, that this charge was as liberal to the plaintiff as the law allowed.

4. In this action, the record of a former action of the son, by the plaintiff as his guardian *ad litem*, against this defendant to recover the damages of the son by reason of the same injuries, was properly excluded. It was *res inter alios acta*.
5. Plaintiff having proved that one railroad company kept its turn-table locked, defendant was properly permitted to show in reply, and as an element in the question of negligence, that other well regulated railroad companies did not keep their turn-tables locked.
6. Plaintiff was not permitted to testify whether he thought it possible that his children could have visited the turn-table without his knowledge—whether his children had spoken to him of any such visit—when was the first time he had heard of such visit—and whether, if they had previously visited it, he or his wife would have known it. *Held*, that these questions, calling for opinion, hearsay, and inference, were properly excluded.
7. The injury complained of having been received in North Carolina, the law of that State as to the age at which a boy may be guilty of contributory negligence (as shown by a decision of her court of last resort, introduced in evidence in this case), must govern an action brought in this State upon this cause of action.
8. The boy being between the ages of 10 and 11 when the injuries were received, the trial judge could not properly charge that the boy could contribute to the injury nor that he could not, but properly charged the jury that the test of the boy's capacity for contributory negligence was his age, his intelligence, his ability to know and appreciate the danger of his surroundings—provided North Carolina law did not fix the age.
9. Evidence of the boy's caution, prudence, recklessness, or impetuosity as an excuse for contributory negligence was properly excluded.
10. On motion for new trial, the judge properly refused to receive testimony to show that one of the jurors in the cause had stated that he had made up his mind before the testimony in court was given to find for the defendant.

Before FRASER, J., Spartanburg, October, 1886.

This was an action by Joseph P. Bridger against the Asheville & Spartanburg Railroad Company, commenced in December, 1883, to recover his damages resulting from injuries done his son, Edgar, while playing on defendant's turn-table at Henderson-

ville, North Carolina, on November 4, 1881. The elements of the damages claimed were expenses incurred, services rendered by plaintiff and his wife, loss of the son's services, abandonment of a profitable business, and employment of an agent—aggregating twelve thousand dollars.

On November 4, 1881, the turn-table of defendant, near its depot in Hendersonville, was fastened with a bolt or chock, but was not locked. Edgar Bridger, aged 10 years and 10 months, together with some other children, were playing on this turn-table, which they had unbolted and were pushing around, when little Edgar was painfully and permanently injured in both legs. For the injuries so received, Edgar Bridger recovered damages from the railroad company, his father, the present plaintiff, being his guardian *ad litem* in that action. See 25 S. C., 24. Pending that case, the present action was instituted. The rulings of his honor, the Circuit Judge, upon questions of testimony and in his charge to the jury, are sufficiently stated in the opinion of this court. The verdict was for the defendant.

The plaintiff moved for a new trial, on the ground that the verdict was contrary to the law and the testimony, and also upon the ground that one of the jurors had stated that he had made up his mind to find for the defendant before the testimony in court was given. The plaintiff stated that the witness was present in court whom he proposed to introduce and have sworn in order to sustain this allegation. Defendant's attorney stated to the court that they had been informed that witness had stated the matter differently to others. No previous notice upon this point had been given to defendant's counsel. His honor stated that he would hear anything looking towards fraud or corruption, but unless there was some such charge made he could not go into the jury room to ascertain the reason influencing their verdict—plaintiff's counsel stating that he made no such charge. His honor ruled that such testimony was incompetent on a motion for a new trial, and refused to hear the witness or to grant a new trial.

*Messrs. J. S. R. Thomson and Bigby & Dorsey*, for appellant.

*Messrs. Duncan & Sanders*, contra.

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November 1, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. In this action the plaintiff sought to recover damages for injuries inflicted upon his son, a boy of tender years, by negligence of the defendant corporation, as alleged. The injury complained of was done in North Carolina, County of Henderson, at a turn-table of defendant. The defence, 1st, denied the negligence, and, 2nd, relied on contributory negligence on the part of the child. The verdict was for the defendant, and the plaintiff has appealed upon thirty exceptions.

These exceptions, or at least so many of them as raise questions for our consideration, may be grouped under four heads, as follows: 1st. Those that complain of error in the Circuit Judge's ruling upon the competency of certain testimony offered, embracing exceptions from one to thirteen inclusive. 2nd. Those that complain that his honor refused to charge without qualification certain requests of plaintiff, embracing exceptions 17, 18, 19, 20, and 21. 3rd. Those complaining of his honor's charge and refusal to charge in reference to the application of the law of North Carolina in a case of this kind—exceptions 22, 23, and 26. And 4th, those complaining of his honor's charge that the age and intelligence of the boy were the tests of his capacity to commit contributory negligence, excluding questions of prudence, childish propensities, and impulses.

Under the first group we find the first allegation of error to be, that his honor allowed one Dr. Allen to testify "that he thought the boy did not act prudently in going on the turn-table." In turning to the Brief, folio 21, it will be seen that his honor excluded this testimony. Upon its being offered the plaintiff objected, and after discussion the objection was sustained. The 2nd allegation is, that his honor erroneously excluded the testimony of one Crossby as to the judgment and discretion of the boy, especially as to danger. His honor excluded this testimony upon the ground that the only pertinent inquiry upon this subject, was as to the capacity and intelligence of the boy, his capacity to know and understand the danger, and not as to his prudence or recklessness in encountering it. We think his honor was right in his ruling here, for reasons to be given under the

discussion of the 4th and last group of exceptions, which involve substantially the same principle. The 3rd allegation of error is the same in substance as the 2nd.

The 4th complains that his honor excluded the testimony of Mrs. McConnell of former accidents upon the turn-table. This testimony was excluded unless knowledge of said accidents was first brought home to the defendant, which was not done. One important rule of evidence is, that testimony to be competent must be pertinent to the issue. The issue here was negligence. We do not see how former accidents happening at this turn-table could be pertinent to said issue, in the absence of all knowledge thereof by the defendant.

The 5th objects to the exclusion of Charles C. Haskell's testimony as to the monthly earnings of the plaintiff. The plaintiff at the time his son was injured was in the employment of the Henry Hill Publishing Company as agent for the sale of books, and the testimony of Haskell was intended to show how much he earned monthly at this business, the plaintiff claiming that he should recover from the defendant the value of his son's services, the value of his own services as a nurse to his son, and his monthly earnings as agent of the publishing company, which he alleged that he lost in consequence of being compelled to nurse and attend to his son while injured, or at least the difference between what he could have earned and the amount of \$400, which it seems he paid some one to attend to his agency. This latter item his honor ruled out, and, therefore, excluded the testimony of Haskell upon this point, saying however: "That if the plaintiff could recover for his loss of time in his agency, it could not be speculative and uncertain wages, but must be contract wages," of which there was no evidence in the case.

We think the general rule in cases of this kind, is that of master and servant, which would include necessary expenses of medical attention, nursing, &c., and the services of the injured party. His honor seemed inclined to extend this rule here in view of the fact that it was proper that the father should become the nurse of his injured boy, and if contract monthly wages had been lost by the father, under his honor's ruling they might have been proved, but speculative and altogether uncertain earnings he

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excluded. We think his honor was as liberal to the plaintiff as the law allowed. The 6th is the same in substance as the 5th.

7th. There had been a previous action on account of this injury in behalf of the boy, the plaintiff here, his father, being his guardian *ad litem*, which resulted in a verdict of \$5,000 for the plaintiff.<sup>1</sup> The record in said case was offered here by the plaintiff; it was excluded, and this is the ground of the 7th allegation of error. The rule of evidence *supra* which requires that the testimony offered in a case should be pertinent to the issue, we think excluded this record. It was *res inter alios acta*, and had no application or pertinency to the case in hand, and, therefore, his honor's ruling was correct.

The 8th complains of the exclusion of certain questions to witness Grambling tending to show enmity between him and the plaintiff. We do not find in the Brief that these questions were excluded; on the contrary, Grambling seems to have testified fully, and without objection.

The 9th complains of the admission of testimony from Divine, Bass, and Bernard as to customs of well regulated railroads in reference to locking and guarding their turn tables. His honor admitted this testimony, saying in substance at the same time, that while it was no defence to say that other railroads did the same thing, inasmuch as railroads have no right to make rules of negligence, yet the question being one of negligence, this fact might be an element in that question, especially in this case where the plaintiff had undertaken to prove that one railroad company did in fact lock its turn-table. And in reply to this testimony he held it competent. With this qualification, there was no error.

The 10th, 11th, 12th, and 13th complain that his honor refused to permit the plaintiff to testify whether he thought it possible that his children could have visited the turn-table without his knowledge—whether his children had mentioned to him of any such visit—when was the first time he had heard of such visit, and whether, if they had visited said turn-table before the evening of the accident, he or his wife would have known it. These questions were properly excluded, as they mostly called for opinions,

<sup>1</sup> See 25 S. C., 24.



hearsay, and inferences, none of which, under the rules of evidence, were admissible from the witness. The testimony of witnesses, as a general rule, is confined to facts, with some exceptions, not applicable, however, here.

The 14th is the same in substance as the 2nd and 3rd, *supra*.

This brings us to the second group of exceptions, in which complaint is made that his honor charged the requests of plaintiff made in several forms: "That children of tender years could only be held responsible for contributory negligence according to their age, capacity, and development," as good law, unless the jury came to the conclusion that the law of North Carolina fixed an age at which they were to be held responsible as adults. The appellant objects to the qualification and proviso as to the North Carolina law. In other words, these exceptions complain that his honor held that the North Carolina law was applicable to the case, and if that law had modified the common law, it should control the jury. This question is the same as that involved in the third group of exceptions. So that, without stating the exceptions *seriatim* in either of these groups, we will now consider this single question upon which they all depend.

His honor held, that in one sense all law in North Carolina, as well as in this State, was statute law, inasmuch as the body of the common law had been adopted by statute in both; but independent of this, that the decisions of the highest tribunal in North Carolina constituted the law there, just as much as if enacted by the legislature, and therefore it made no difference in this case how it had been declared law in North Carolina that children of a certain age should be regarded legally capable of contributory negligence, yet if such a law had been announced, either by decisions in the court of last resort or by act of legislation, it was the law of the case then before the court, although it might be contrary to law of South Carolina.<sup>1</sup> We think his honor's ruling upon this subject was correct. The cause of action arose in North Carolina. The injury was inflicted there, and if the parties had remained in that State and brought action there, they would have been compelled to stand or fall by the law there.

<sup>1</sup> Defendant introduced in evidence the case of *Manly v. Railroad Company*, as reported in 74 N. C., at page 655.—REPORTER.

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And we cannot see upon principle how stepping over the line could give the plaintiff a new and altogether enlarged cause of action—in fact, a cause of action which he did not have before, and, therefore, which he could not have enforced in the tribunals having jurisdiction of the matter at its origin. All this is upon the assumption that the injured boy was over the age fixed by the law of North Carolina, and that he contributed to his own injury. In such a case the plaintiff would have had no cause of action in North Carolina, and having no cause in North Carolina where the injury was inflicted, he could have none here. See cases of *Atlanta & Charlotte Airline R. R. Co. v. Tanner*, 68 Ga., 384; *Atchison, Topeka & Santa Fe R. R. Co. v. Moore*, 29 Kan., 642.

His honor charged generally, that the test of the boy's capacity for contributory negligence was his age, his intelligence, his ability to know his surroundings, and the danger of what he was doing with the turn-table, and if the jury found as matter of fact that that boy had sufficient intelligence, &c., &c., to know and understand these things, all of which was for them, that then he would assume to charge that such one was subject to the rules of ordinary care and diligence, and failing to exercise the same would defeat the right of the plaintiff to recover here, if he contributed to his injury. This general charge is made the cause of the exceptions embraced in the 4th group, *supra*. The injured boy does not seem to have been so young as to have required the judge to say that he could not contribute to his injury. Nor was he of that age where the presumption would necessarily arise in the absence of testimony to the contrary that he could. Under these circumstances his honor left the question very properly to the jury, resting it upon the intelligence and capacity of the boy, as was done in the former case of *Edgar Bridger* against this defendant—provided, however, that the North Carolina law did not establish a different principle by fixing a certain age, which the judge also left to the jury, with a very strong intimation that it had not, of which, of course, the appellant has no cause of complaint. We find no warrant of law which would have authorized the judge to extend the principle so as to have allowed testimony as to the caution, prudence, recklessness, or impetuosity of the

boy, as an excuse for contributory negligence, notwithstanding his intelligence and capacity should have taught him better. We do not think the cases cited and relied on by appellant controvert this principle.

The 15th exception complains that his honor, on the motion for new trial, refused to allow testimony to show that a juror had formed an opinion before hearing the case. We think his honor's ruling here is sustained by the principles laid down in the cases referred to by the respondent, to wit: *McCarty v. McCarty*, 4 Rich., 594, 47 A. D., 585; *Pulaski & Co. v. Ward & Co.*, 2 Id., 122; and *Josey v. Railroad Co.*, 12 Id., 136.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

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LUDDEN & BATES SOUTHERN MUSIC HOUSE v. DUSENBURY.

1. Where a hired chattel was, by the terms of the agreement, received by the bailee at the place of the contract and then shipped by the bailor to the home of the bailee, who, offering to pay the freight but refusing to pay a charge for storage, does not remove it from the depot, the chattel is nevertheless in the possession of the bailee.
2. An agreement stipulated for the hiring of an organ valued at \$95 for the term of nine months at a monthly rental of \$10, with an option to the bailee to buy it at any time within that period at the said valuation, in which case the money paid for the rental should be deducted from the purchase money. *Held*, that this was not a mortgage or a conditional sale, but a contract of hiring only with an option to buy at a future time.
3. This case distinguished from *Talmadge v. Oliver*, 14 S. C., 522; *Straub v. Screven*, 19 Id., 445; and *Herring & Co. v. Cannon*, 21 Id., 212.
4. This agreement not having been recorded as required by the act of 1882 (18 Stat., 35), it was void as to a subsequent purchaser at a sheriff's sale from the bailee, in possession, for value, without notice; and therefore the purchaser was entitled to retain it as against the bailor.

Before WALLACE, J., Horry, October, 1886.

The Circuit Judge charged the jury in this case that the

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agreement was a conditional sale of the organ to be paid for in monthly instalments, the condition being fulfilled when these instalments were all fully paid; that in order to prevent the rights of subsequent creditors and purchasers for valuable consideration without notice from attaching, the paper should have been recorded; that the possession had vested in Franks; and that the words used—"hiring" and "renting"—did not make the contract, but the contract must be construed by its meaning as gathered from its import and purport.

Other matters are stated in the opinion.

*Mr. W. W. Harllee*, for appellant.

*Mr. Jos. T. Walsh*, contra.

November 25, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. This action was brought by the plaintiffs to recover possession of an organ shipped by the plaintiffs from Goldsboro, North Carolina, to A. W. Franks at Bucksville, S. C., on or about March 26, 1884, under an agreement, of which the following is a copy :

"NOTICE TO LESSEE.—Carefully read the terms of agreement before signing, as no verbal or written agreement or understanding not contained herein will be recognized by us.

"(Signed) LUDDEN & BATES SOUTHERN MUSIC HOUSE.

"This certifies that I, A. W. Franks, now residing at Bucksville, Horry County, South Carolina, have received of Ludden & Bates Southern Music House one Packard organ, style 14, No. 22160, and valued at ninety-five dollars, which I am to use with care and to return in as good condition as it now is, the ordinary use and wear thereof excepted; and in case of loss or damage by fire, water, tempest, or otherwise, I agree to make good such loss or damage. I have agreed to hire said instrument for the term of nine months from this date, and to pay during said term the sum of ninety-five dollars as rent therefor, in the following manner, viz., ten dollars on March 25, 1884, which is in payment of the rent for the first month only, and as advance deposit to secure against damages to said instrument while in my possession, or for any expenses incurred in its recovery in case the aforesaid rental payments are not paid as agreed; and thereafter

ten dollars on the 25th day of each and every month thereafter during the term above specified, with interest at the rate of 8 per cent. after maturity upon all rental payments not made as above stipulated. I further agree to make all payments in current funds at their office at Savannah, Georgia, without notice or demand, and to assume all cost of remittance of collection of drafts, etc. But if default shall be made in either of said payments, or I shall sell, offer for sale, remove, or attempt to remove, the said instrument from my aforesaid residence without the written consent of said Ludden & Bates Southern Music House, then, and in that case, I agree to return the same, and they, or their agent, may resume actual possession thereof; and I hereby authorize and empower the said Ludden & Bates Southern Music House, or its agent, to enter the premises wherever said instrument may be and take and carry the same away, hereby waiving any action for trespass or damages therefor, and disclaiming any right of resistance thereto. And I further agree to pay all expenses incurred by the said Ludden & Bates Southern Music House in the renting and returning of said instrument, including reasonable attorney fees, all other legal expenses which may be incurred in obtaining possession of said instrument, or in the collection of any payments due thereon. It is also further understood that I may, at any time within said term of rental, purchase the said instrument by paying the above valuation therefor, and then, and in that case only, all amounts theretofore paid as rental or advance deposit, shall be deducted from price of instrument.

“Witness my hand and seal this 25th day of March, 1884.

“(Signed)

A. W. FRANKS. [L.S.]”

When the organ reached its destination at Bucksville it was stored in a warehouse, and when Franks, some time after its arrival, applied for it, offering to pay the freight, but declining to pay the storage, he could not get it. Afterwards, on July 15, 1884, the organ, while still in the warehouse, was levied on by the sheriff under an execution, issued to enforce a judgment recovered by Sampson & Son against Franks in 1883, and at the sale under such execution the defendant became the purchaser, and he having complied with his bid took possession of the organ, and this action was then brought against him by the plaintiffs to recover possession of the organ, they basing their claim upon the grounds that Franks never had any such title to, or possession of, the organ as would subject it to the lien of an execu-

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tion against him, and that defendant could not claim the protection accorded to a subsequent purchaser for valuable consideration without notice.

Under the charge of the Circuit Judge the jury rendered a verdict for the defendant, and from the judgment entered thereon the plaintiffs appealed upon the several grounds set out in the record. These grounds raise three questions: 1st. Whether Franks ever had such a possession of the organ as would render it liable to levy and sale under an execution against him. 2d. Whether the title to the organ ever passed out of the plaintiffs, either absolutely or conditionally, and into Franks. 3d. Whether the defendant can claim the protection accorded to a subsequent purchaser for valuable consideration without notice.

These questions all depend upon the answer to the inquiry—what was the real nature of the contract between the plaintiffs and Franks, as evidenced by the agreement, of which a copy is above set out? If, as the Circuit Judge instructed the jury, the true construction of this agreement is, that it was a contract for the conditional sale of the organ, whereby the plaintiffs retained the title for the purpose of securing the payment of the purchase money, then clearly the relations between the parties were those of mortgagor and mortgagees (*Straub v. Screven*, 19 S. C., 445); and as the agreement was not recorded, and there is no pretence that the defendant had actual notice of the agreement, he was clearly in the position of a subsequent purchaser for valuable consideration without notice under the case of *McKnight v. Gordon*, 13 Rich. Eq., 222. So, too, if there was a conditional sale of the organ, then the delivery to the carrier was a delivery to the consignee, Franks, although he never acquired the actual possession, and the instrument, wherever found, would be liable to levy under an execution against Franks. Indeed, it appears from the terms of the agreement itself that Franks acknowledged having received the article, and if he chose to take it at Savannah, where the agreement seems to have been executed, it must thenceforward be regarded as in his possession through his agent, the carrier, by whom it was transported to Bucksville.

The only serious question, then, in the case is as to the con-

struction and effect of the written agreement entered into between the plaintiffs and Franks. There can be no doubt that it is competent for parties to enter into a written agreement for the hire or loan of a chattel, and until the passage of the act hereinafter referred to, there was no law requiring such an agreement to be recorded in order to protect such chattel from the claims of the creditors of, or purchasers from, the hirer or borrower, whether antecedent or subsequent. It being clearly competent for parties to make such an agreement, the practical inquiry in this case is, whether they have done so. What was the intention of the parties in making this agreement? This must be discovered from the words which they have used, for we have no evidence beyond that. Looking, then, to the language employed, it would seem that they could not well have used stronger language than was employed to express an intention to make a contract of hiring. The transaction is so characterized in express terms throughout the whole instrument, and there is not a word in it that indicates, in the remotest degree, that the parties contemplated a sale, until we come to the last paragraph, and then the language used clearly imports—not an intention to make a *present* sale—but simply an intention to give Franks an *option* to buy at some *future* time, if he shall *then* desire to do so. The language is: “I *may* at any time, within said term of rental, purchase the said instrument;” it is not “I *will*” purchase.

This clearly negatives the idea that there was a sale at the time the agreement was entered into, and does not even denote an intention that there was to be a sale, at all events, at some future time; but simply an intention that Franks might, within the time limited, become the purchaser, if he saw fit to do so, but there was nothing to bind him to become a purchaser if he did not thereafter choose to buy. How such language can be construed as evidencing an intention to sell at the time the agreement was entered into, it is difficult to conceive. For if that was the intention, then it would have been not only useless, but absurd, to insert the provision that Franks might, at a subsequent time, if he saw fit to do so, become the purchaser. It would certainly look very much like an absurdity for a man, after having entered into

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a contract for the purchase of an article, to insert in such contract a stipulation that he might thereafter have the option of purchasing the same article—a privilege to buy an article which he had already bought.

Test the question in this way : Suppose that, under this agreement, Franks had received actual possession of the organ, and after enjoying such possession for four months the instrument had been destroyed, or rendered entirely useless, by the act of God or the public enemy, and that Franks had thereupon offered to rescind the contract, offering to pay the stipulated rent for four months, would it have been possible for the plaintiffs to recover the whole amount of ninety-five dollars? This would depend upon an inquiry whether the contract was one of rent or sale. If the former, Franks would undoubtedly be only liable for the stipulated rent during the term in which he enjoyed the use of the thing hired (*Bacot v. Parnell*, 2 *Bail.*, 424 ; *Coogan v. Parker*, 2 *S. C.*, 255), but if the latter, then he would be clearly liable for the whole amount. The plaintiffs, relying upon this agreement, certainly could not claim that there was a sale, for, as we have seen, the contract in express terms characterizes the transaction as an agreement for rent and not for sale ; the only mention of a sale being in the latter part of the agreement, where Franks reserves *the right to become a purchaser* at some future time.

So that it cannot be said that there was even an agreement to sell at a future time, as there was nothing to bind Franks to become a purchaser, but that was left entirely to his own option. But even if the contract could be regarded as an agreement to sell at a future time, that would be a very different thing from a present sale. As is said in 1 *Pars. Cont.*, 528 : "An agreement to sell is a different thing from a sale, and therefore no mere promise to sell hereafter amounts to a present sale." If, therefore, under the circumstances supposed, the plaintiffs had brought an action against Franks to recover the price of the organ, Franks could certainly have claimed that he was not liable, because there was no contract of sale, but, at most, simply a reservation on his part of the option to become a purchaser, of which he had never availed himself.

The only ground upon which it is contended that this agree-



ment was really intended as a contract of sale and not of hiring, is the fact that the rent or hire reserved amounted to as much as the purchase money. This standing alone, in the absence of any evidence of any fraud or undue advantage, would not be sufficient to convert the plainly expressed intentions of the parties into something else which they have not expressed. If parties have the right, as they unquestionably have, to make a contract for the renting or hiring of personal property, the mere fact that the rent or hire agreed upon is extravagantly high, cannot have the effect of defeating the contract or converting it into a contract of a wholly different character.

This case differs materially from the cases of *Talmadge v. Oliver*, 14 S. C., 522; *Straub v. Screven*, 19 Id., 445; and *Herring & Co. v. Cannon*, 21 Id., 212, cited in the argument. In *Talmadge v. Oliver*, the contract, by its express terms, plainly implied that the horse there in question was delivered to Foster, upon the consideration that Foster was to board Talmadge and wife for a specified time, and that Talmadge merely reserved the title to the horse as security for the performance of Foster's agreement. Practically, it amounted to this—that Talmadge sold the horse to Foster, and was to receive payment of the price in the board of himself and wife, and to secure the performance of this agreement by Foster to furnish the board—to pay the purchase money—Talmadge reserved title to the horse. This was held to amount to a mortgage, or rather, an instrument in the nature of a mortgage, for all the incidents to such a transaction were there present—the obligation of Foster to pay the purchase money of the horse in board, and the retention of title by Talmadge to secure the performance of such obligation.

So in *Straub v. Screven*, the notes sued upon in terms imported a sale of the mills and the retention of the title to secure the payment of the purchase money, and hence it was held that the relation between the parties was that of mortgagor and mortgagee. In *Herring v. Cannon*, the agreement showed in express terms that there was a sale of the safe, and that the retention of the title was to secure the payment of the purchase money—"this note having been given to said Herring & Co. in part payment for a safe, and in accordance with the terms of an agreement for

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*the purchase thereof*, said Herring & Co. do not part with any title thereto until the purchase money has been fully paid." It was, therefore, plain that the transaction was in the nature of a mortgage.

In all these cases, therefore, it appeared from the terms of the agreements that the transactions were intended by the parties to be sales, and there was nothing to show that the transaction was of a different character—an agreement for a loan or a hiring. Here, however, the agreement by its express terms does show a contract of hiring, and does not show any contract of sale.

If, therefore, this case had arisen under the act of 1843, as it was originally adopted, or as it was re-enacted in sections 2022 and 2346 of the General Statutes of 1882, the defendant would not have been able to avail himself of the protection accorded to subsequent purchasers for valuable consideration without notice, because by that act such protection was accorded only against an unrecorded mortgage or instrument in the nature of a mortgage, and against a *vendee* claiming under a *verbal* agreement for the sale of personal property; because if the agreement was, as we have seen, not a contract of sale, but a contract of hiring, there could be no ground for construing the agreement as a mortgage, or an instrument in the nature of a mortgage, nor could Franks be regarded as a vendee.

But by the act of December 21, 1882 (18 *Stat.*, 35), which seems to have been overlooked on Circuit, as well as in the argument here, very important and material amendments have been made to section 2022 of the General Statutes, whereby that section now reads as follows: "Every agreement between the vendor and vendee, bailor and bailee, of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors, or purchasers for valuable consideration without notice, unless the same be reduced to writing and recorded in the manner now provided by law for the recording of mortgages: provided, that nothing herein contained shall apply to livery stable keepers, inn keepers, or any other persons letting or hiring property for a temporary purpose."

It will thus be seen that the law as it now stands, and as it

stood when the agreement here in controversy was made, is no longer confined to *verbal* agreements, but extends to *every* agreement, and that it covers agreements between *bailor and bailee* as well as those between *vendor and vendee*, and that all such agreements must be reduced to writing and recorded like mortgages, in order to make them valid against the claims of subsequent creditors or purchasers for valuable consideration without notice. Inasmuch, therefore, as the agreement here in question was never recorded, and inasmuch as there is no evidence that the defendant, who, as we have seen, must be regarded as a subsequent purchaser, ever had any notice of the agreement, it is quite clear that, even regarding the agreement as a contract, not of sale, but a contract of hiring, which is a bailment, the defendant was entitled to recover.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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GARVIN v. GARVIN.

1. A surety paid a judgment against his principal and himself, and then directed a levy on the principal's property, who thereupon instituted suit to enjoin. A decree was rendered in the surety's favor—that he “have leave to enforce said judgment to the amount contained in his said execution, with interest from its date.” Under an execution issued and entitled of this latter cause, for the amount due and for the costs, a tract of land was levied and sold as the property of the principal. *Held*, that the sale could be referred to both judgments, and that the purchaser was protected by the lien of the old judgment as well as of that under which the sale was made.
2. The court is not bound by the argument of an opinion, but only by what is decided by it.

Before COTHRAN, J., Aiken, April, 1886.

The opinion states the case.

*Messrs. G. W. Croft and Henderson Bros.*, for appellant.

*Messrs. Izlar & Glaze and P. A. Emanuel*, contra.

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November 25, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This was an action to recover a tract of land in Aiken County. In order to be intelligible, it will be necessary to make a short statement. Both the plaintiff and defendant claimed under Robert Garvin, the brother of the plaintiff and the father of the defendant—the plaintiff under a deed from the sheriff, who sold the tract in dispute, along with others, as the property of Robert, under a judgment and execution of the plaintiff, January 7, 1878; the defendant claimed under a deed direct from his father, Robert, prior to the afore-said sheriff's sale, viz., April 15, 1874. The principal question, therefore, was whether the plaintiff's judgment had a lien upon the land when it was conveyed by Robert to his son in 1874.

There had been a long litigation between the brothers, John and Robert, as to the validity of a certain judgment, *John Fox v. Robert Garvin, John Garvin, et al.*, originally entered as far back as 1868, upon which John claimed to have paid \$1,836.65, as surety of Robert, and to that extent to be the owner of the judgment by subrogation. In this view John had the (Fox) judgment levied upon the property of Robert, who thereupon instituted proceedings on the equity side of the court against John, for the double purpose of enjoining the enforcement of the Fox judgment on the ground that he (John) was one of the principals, and the judgment was in fact paid, and also for "an account" to a large amount. John answered that he was only surety in the Fox judgment, and that he was entitled to enforce it for what he had paid on it, \$1,836.65, and that he owed Robert nothing on "the account claimed." He prayed that the complaint should be dismissed, but asked for no affirmative relief.

The issues of law and of fact were referred to J. M. Williams, Esq., as referee, who found the principal facts for John: that he was only surety on the Fox note, and that he owed Robert nothing; and "the defendant (John) should have leave to enforce said judgment, to the amount contained in his said execution, with interest from its date," &c. Exceptions were filed, and the cause was heard by Judge Reed, who, on September 14, 1877, filed the following decree: "On reading and filing the report of J. M. Williams, Esq., special referee herein, &c., it is ordered,

that the exceptions be overruled and the report of the referee be confirmed, and the plaintiff have leave to enter judgment in accordance therewith, and the same become the judgment of this court," &c. Upon this decree judgment was enrolled and execution issued by John, the defendant, under the title of the case in which it was rendered, viz., *Robert Garvin v. John Garvin*. The lands were sold under this execution and purchased as before stated by the plaintiff (John) on January 7, 1878. Robert Garvin afterwards made a motion to set aside the execution and the sales under it, which was denied by Judge Pressley, and upon appeal to this court his order was affirmed. See *Garvin v. Garvin*, 21 S. C., 84, where a short history of the case is given.

In that case this court held as follows: "Was the execution under which the sales were made so irregular and illegal as to avoid the sales? It seems to us that, when properly understood, the objections are purely technical, and amount to this—that the execution was called by the wrong name. The judgment entered in the case of *Robert Garvin v. John Garvin*, authorized the defendant (John) to issue execution against the plaintiff (Robert) for the sum of \$1,836.65, with interest thereon from May 9, 1876, on the judgment of *Fox v. Robert Garvin*, assigned to the defendant, and that the defendant do recover of the plaintiff the further sum of \$472.40 costs," &c. Was this not a judgment on a money decree for \$1,836.65, and the further sum of \$472.40? The execution issued for the precise sum authorized, but entitled of the case out of which it arose, *Robert Garvin v. John Garvin*, and not of the old *Fox* judgment for the use of John. We incline to think the execution was properly entitled of the case in which the judgment was rendered. But suppose it had been styled (as contended it should have been) '*John Fox for the use of John Garvin*,' how could that have benefited Robert Garvin? \* \* \* The execution was certainly to issue, whether it went in the old name or put into a new form to enforce judgment for the money paid by John, being, however, for the identical amount due on the old execution by Robert. We think the execution was authorized by the enrolled judgment, and that it properly retained the title of the judgment, upon which it was based. But even if there was a misnomer as to the

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title, that could not be more than an irregularity, which did not render the execution absolutely void"—citing authorities.

The sales being thus affirmed, John Garvin, as purchaser, brought suit to recover the different tracts of land. He found the defendant, R. C. Garvin, in possession of the "Mill tract," claiming, as stated, under a deed from Robert, older than the judgment in the case of *Garvin v. Garvin*, under which the plaintiff purchased. He interposed several defences, and among others the statute of limitations; but he first made the point that John Garvin, having obtained judgment against Robert for the amount alleged to have been paid by him as surety in *Fox v. Robert Garvin*, that older judgment was superseded and merged into that of *Garvin v. Garvin*, which, of course, acquired a lien on the property of Robert only from the time of its entry, December 10, 1877.

The cause came on for trial before Judge Cothran, who took the view of the defendant, and granted a non-suit upon the ground that the plaintiff, John, having accepted without appeal the relief given by Judge Reed's order, for the money paid as surety for Robert in the case of *John Fox v. Robert Garvin et al.*, could not "now set up the older lien of the Fox judgment, which was merged into the later judgment of *Garvin v. Garvin*, in which his claim for money paid was adjudicated," &c. From this order the plaintiff appeals upon the following grounds: "1. Because his honor erred in deciding that the judgment of *John Fox v. Robert Garvin et al.*, was merged in the judgment of *John Garvin v. Robert Garvin*, entered under Judge Reed's order; and his honor also erred in holding that said judgment had lost its lien upon the tract of land that was sold by Robert Garvin to the defendant. 2. Because it is submitted that the judgment entered under the order of Judge Reed preserved the lien of the Fox judgment upon all the lands owned by Robert Garvin at its date, and authorized the issuing of the execution under which the land in dispute was sold; and that even if such execution was unauthorized, then the sale of the land might be referred to the execution of John Fox and J. H. Livingston, his assignee, for the use of *John Garvin v. Robert Garvin et al.*, issued under the transcript of judgment, &c., and his honor erred

in not so deciding. 3. Because it is submitted that the case as proved, shows a legal title to the land in dispute in the plaintiff, and the trespass on the part of the defendant having also been proved, the case should have gone to the jury, and it was, therefore, error to dismiss the complaint."

The only question in the case presented is, whether it was error to hold that the judgment of *Fox v. Robert Garvin et al.*, was merged into that of *Garvin v. Garvin*, and the plaintiff, John Garvin, had no lien upon the property of Robert older than the judgment in the latter case, which was entered on December 10, 1877, after the "Mill tract" was sold to the defendant. Something was said in the argument as to the point having been already decided in the former opinion of this court, in the last report of the case of *Garvin v. Garvin*, 21 S. C., 87. It is true that the member of the court who was charged with writing that opinion, did in the last paragraph indicate some such view. But the question now made was not then before the court. The single question there was, whether the execution entitled as of the case of "*Garvin v. Garvin*" was so irregular and illegal as to avoid the sales made under it. That was decided negatively, and, of course, is *res adjudicata*. The court, however, is not considered as bound by the argument of an opinion, but only by what is decided by it. The remark referred to was made in the course of argument, was unnecessary to the question then under consideration, and was one of those observations which, as some one has well said, "fall from a judge on a legal question suggested by a case before him, but not arising in such a manner as to require decision by him. It is, therefore, not binding as a precedent on other judges, although it may be entitled to more or less respect," &c. The question now made for the first time is *res integra*.

When John Garvin was enjoined from enforcing the Fox judgment against Robert, he did not in terms pray for affirmative relief as to renewal of the Fox judgment or execution to enforce it; but he did deny the allegation of the complaint that he was one of the principal debtors, and claimed that he was only surety, and as such had paid for Robert \$1,836.65. This made an issue as clearly as if he had sued Robert for so much money paid to his

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use. The case went to the referee, Williams, who found the facts for John, his report was confirmed by Judge Reed's order, and judgment was enrolled and execution issued in that case, *Garvin v. Garvin*. It seems to us that this was no renewal of the Fox judgment or execution, but an original adjudication of the issue joined, into which no part of the older Fox judgment could be incorporated so as to give it, as legal process, a different date from that on which it was filed.

The judgments, then, being distinct, did the rendition of the latter have the effect of merging into it the older Fox judgment? That must, as I think, depend upon the inquiry whether the Fox judgment was the cause of action of the Garvin judgment. "A judgment is extinguished when, being used as a cause of action, it grows into another judgment." *Freem. Jud. Sales*, 216. So the Fox judgment would be merged in that of *Garvin v. Garvin*, if the former were the cause of action of the latter. It is true that they were very closely connected, but when critically examined, we think it appears that the Fox judgment was not the consideration of the Garvin judgment. The cause of action in the latter was the money paid by John for Robert on the Fox judgment, but not that judgment itself, which was entered on a note, for a larger sum, long before John paid the money for which he recovered. It was the question of fact as to the payment of the money, which was adjudged in the case of *Garvin v. Garvin*. It is true, the amount recovered was precisely the same, and in the same right, as that claimed by John on the Fox judgment, but that question between John and Robert, although arising out of the Fox judgment, had really never been adjudicated, and we cannot say that merely this adjudication brought the case within the principle of "merger." "The law of merger as applied to judgments does not forbid all inquiry into the nature of the cause of action. Such inquiry may be prosecuted for any purpose consistent with the judgment, and is frequently necessary to its interpretation. \* \* \* If the prevailing party was entitled to certain privileges, or exempted from certain burdens, under his contract, he may be entitled to the same privileges and exemptions in many cases, under his judgment." *Freem. Jud. Sal.*, § 244 and notes.

The judgments, then, both being in existence, and the pro-



perty of the debtor Robert being sold by the sheriff under process issued under the junior one of *Garvin v. Garvin*, could the plaintiff have the benefit of the older lien of the Fox judgment? It seems to me that the confusion in the case has arisen from the fact that, while John has a judgment in his own name for the money paid by him on the Fox judgment, he claims to enforce it with the lien, not of the judgment in his own name, but of the older Fox judgment, also owned by him. There is no doubt that ordinarily the lien of a judgment is limited to the time of its entry. But the seeming anomaly here is caused by the application of the doctrine of subrogation, which is of very wide extent and operation. It must be considered as established in *Garvin v. Garvin*, that John, as the surety of Robert, paid the money on the judgment of Fox, as surety, which *ipso facto* (to that extent), entitled him to that judgment with its original lien. It became his property.

Besides the general doctrine, we have in this State an act, which in express terms covers this case. Section 2180 of the General Statutes provides that: "The payment by a surety of a debt secured by judgment or decree shall not operate as a satisfaction of such judgment or decree against the principal debtor, but by such payment the said surety shall be entitled to all the rights and privileges of the plaintiff in such judgment or decree," &c. Now, if the payments by John as surety had not been contested, there can be no doubt that he could have levied and sold under the Fox judgment, as if he, instead of Fox, had been named the plaintiff in the judgment. Why should it alter the case that he established his payments judicially in the case of *Garvin v. Garvin*? We suppose that a surety in a judgment who pays it, is thereby entitled to the judgment, whether his payments were made to appear by simple receipts which were admitted, or he established them in a judicial proceeding.

The doctrine of subrogation is essentially equitable, and is therefore always controlled by equitable principles. While I cannot see how the order of Judge Reed, in the equity suit of *Garvin v. Garvin*, could give active energy as legal process to the execution on the Fox judgment, which, as it seems to me, could only be done upon proper application and in the manner

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prescribed by law for that purpose ; yet I think that the confirmation of referee Williams's report, which gave John Garvin "leave to enforce said judgment (Fox) to the extent of the amount mentioned in his said execution with interest from its date," was substantially a decree by Judge Reed, for the money paid by John as surety on that judgment, coupled with the declaration that, in enforcing that money decree, he was entitled to the right of subrogation and the lien of the older Fox judgment. "The equitable jurisdiction of subrogation still remains, and has some most important advantages. All the co-sureties and the principal debtor being parties to the equity suit, the liabilities of each can be adjusted and established by a single decree," &c. 3 *Pom. Eq. Jur.*, section 1418 and notes.

The judgment of this court is, that the non-suit granted upon the Circuit be set aside, and the cause remanded for a new trial.

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GOURDIN v. DEAS.

1. Where land was conveyed by deed to one in trust for D. for life, "and after her death to her issue to take *per stirpes*, their heirs and assigns forever," D. took an estate for life with a vested, transmissible remainder to her immediate issue, and the rule in Shelley's case does not apply.
2. Therefore at the death of the life-tenant, the land vested in possession in such of the children of D. as were *in esse* at the date of the deed or who were thereafter born to her, and the share of such of said children as predeceased the life-tenant passed to their issue, or, leaving none, to their heirs or devisees.
3. The issue of a child, who was living at the death of D., took no part of the land—"issue" in this deed meaning immediate issue, or, they being dead, their children, by representation, as shown by the use of the words "*per stirpes*."

Before KERSHAW, J., Charleston, November, 1886.

This was an appeal from the following Circuit decree :

The questions I am called upon to determine are: 1. What estate did Eliza C. Deas take in the said lot? 2. Who take at

her death? 3. If the fee was not in said Eliza C. Deas, what portions of the property are liable to the mortgage above mentioned? These questions have been very ably argued by the counsel, and with the assistance thus afforded me I have had no difficulty in arriving at the following conclusions.

The rule in Shelley's case does not apply here, for the reason that the estate of the ancestor, Eliza C. Deas, is a trust estate, and as said by Mr. Fearn, in his treatise on Remainders, p. 52: "Where the estate limited to the ancestor is merely an equitable or trust estate and that to his heirs carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor, as (in general) would have been the case, if they had been both of one quality, that is, both legal or both equitable." Here the estate of Eliza C. Deas is equitable, the legal estate for her life being in the trustee, but it is executed by the statute in the issue of the said Eliza and is, consequently, a legal estate in them from the time the same vested in remainder. The interest of the remaindermen and that of the ancestor being, therefore, of different qualities could not coalesce, and the rule in Shelley's case is inapplicable; the remaindermen took as purchasers. *Austin v. Payne*, 8 Rich. Eq., 12.

For another reason this construction must prevail. The limitation is to the said Eliza for life, "and after her death to her issue to take *per stirpes*, his heirs and assigns." The issue is made the root of a new inheritance, and in such a case the rule in Shelley's case does not apply. *McIntyre v. McIntyre*, 16 S. C., 290.

It is manifest, therefore, that Eliza C. Deas had only a life estate in the property in question, and could neither devise nor change the estate after her death. The remaindermen were her issue and their heirs to take *per stirpes*; her children and grandchildren, the latter to take as representing their parents. The remainder was vested. It vested in Robert C. Deas, who was in *esse* at the date of the deed, at the moment of its execution. As other children of Eliza C. came into being, the estate opened to let them in and so it became vested in all children born to Eliza C. It was, however, only to vest in possession after the death of Eliza C., and was subject to be divested by the death of any of

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the children in her lifetime. In that case the interest of such decedent lapsed and fell into the corpus of the estate, and vested in the surviving remaindermen.

At the death of the life tenant the whole was distributable among the children and grandchildren of the said Eliza C. Deas then living, so that each child should take one portion, and the children of each deceased child among them, the share which their respective parents would have taken if then living. The estate thus limited is in fee simple, for the terms are "to her issue, &c., his heirs and assigns, to his and their only proper use, benefit, and behoof forever." No doubt, the word "*his*" should have been "*their*" before "*heirs*," &c. These propositions are sustained by ample authority; among others the following cases may be cited: *Wilson v. McJunkin*, 11 *Rich. Eq.*, 527; *Seabrook v. Gregg*, 2 *S. C.*, 69; *Williman v. Holmes*, 4 *Rich. Eq.*, 478; 4 *Kent Com.*, 202-206; 2 *Wash. Real Prop.*, 230-231; *Glenn v. Glenn*, 21 *S. C.*, 308; *Britton v. Johnson*, 2 *Hill Ch.*, 431.

This furnishes a ready solution for the inquiry: Who take the estate at the death of Eliza C. Deas? There were eight children born to her, to wit: Robert L. Deas, Zephaniah Deas, John S. Deas, James C. Deas, Maria S. Eaden, Eliza J. Ready, Jeannette A. Deas, and Mary Clara Mason. Of these Robert L. and Zephaniah Deas died in the lifetime of their mother, Eliza C., leaving no issue. John S. Deas died in the lifetime of the said Eliza C., leaving five children, all of whom survived the said Eliza C. Deas.

The estate, therefore, was divisible into six shares or portions, of which James C. Deas is entitled to one share, Maria S. Eaden to one share, Eliza J. Ready to one share, Jeannette A. Deas to one share, Mary Clara Mason to one share, and the children of John S. Deas, above named, to one share among them. The portions of those remaindermen who joined in the mortgage, are liable to the mortgage debt, to wit: James C. Deas, Jeannette A. Deas, Mary C. Mason, and Eliza J. Ready.

It is ordered, adjudged, and decreed, that the lot of land described in the complaint be divided and distributed among the parties entitled in accordance with the principles herein adjudged, &c.

*Messrs. Trenholm & Rhett*, for Mrs. Allen.

*Mr. H. A. DeSaussure, jr.*, for Mrs. Julia W. Deas.

*Messrs. B. H. Rutledge, jr.*, and *Simons & Cappelmann*, for the Mason children.

November 28, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. The questions presented by this appeal arise upon the construction of a deed whereby certain real estate was conveyed to the plaintiff "in trust for Eliza C. Deas, wife of R. C. Deas, to her sole, separate, and exclusive use, free from the debts, contracts, or liabilities of her present or any future husband, for life; and after her death to her issue, to take *per stirpes*, his heirs and assigns, to his and their use, benefit, and behoof forever." The word "his" which we have italicized in this quotation is manifestly a clerical error, and should have been "their"; and this seems to be conceded by all parties.

Eliza C. Deas had in all eight children, viz.: Robert L., Zephaniah, John S., James C., Maria S. Eaden, Eliza J. Ready, Jeannette A. Deas, and Mary Clara Mason, of whom, as is stated in the "Case," "some were *in esse* at the time of this conveyance and some were born subsequently," but it is not there stated which of them were *in esse* at the date of the deed, and which were born subsequently, though it is stated in the Circuit decree that Robert L. Deas was *in esse* at the time the deed was executed. Robert L. Deas died in 1865, without issue, leaving a will whereby he gave all his right, title, and interest in the property covered by the deed to his wife, who is now the defendant, Hannah G. Allen, one of the appellants herein. Zephaniah Deas died intestate previous to his mother, without issue, leaving a widow, the defendant, Julia W. Deas, who is also one of the appellants. John S. Deas died intestate previous to his mother, leaving a widow, the defendant, Fanny Deas, and six children, who are likewise defendants. James C. Deas is still living, unmarried, never having had issue. Maria S. Eaden is still living, but without any issue. Eliza J. Ready is still living having issue, two sons, who are defendants. Jeannette A. Deas

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is still living and has issue, five children, who are defendants, but make no claim. Mary Clara Mason is still living, having issue seven children, the youngest of whom was born subsequent to the death of the life-tenant, Eliza C. Deas, and these children are defendants and appellants herein.

Eliza C. Deas having executed a mortgage to the defendant, Martha S. Eaden, on the property in question, in which the defendants, Jeannette A. Deas, Mary Clara Mason, Eliza J. Ready, and James C. Deas joined, departed this life in 1886, having, by her will, of which the defendant, H. E. Young, is executor, undertaken to devise the property covered by the deed to the defendants, Jeannette A. Deas and Mary Clara Mason. Soon after her death the plaintiff, as trustee, instituted this action, to which all persons who could by any possibility have any interest in the property are made parties, for the purpose of obtaining the instructions of the court as to the disposition of the property after the death of the life-tenant.

The Circuit Judge held that Eliza C. Deas took an estate for her life only, with remainder to her issue, and therefore she could neither devise nor charge the estate after her death. Hence her attempt to devise it must be regarded as futile, and the mortgage bound only the shares of such of the remaindermen as joined in the mortgage. The remainder he held was a vested remainder, vesting at the time of the execution of the deed in such of the issue as were then *in esse* and opening to let in such other issue as were born during the life-time of the life-tenant. But he held that the remainder was only to vest in possession after the death of the life-tenant and was divested by the death of any of her children during her life-time. Hence he held that at the death of Eliza C. Deas the property was distributable amongst her children and grandchildren then living, so that each child should take, in fee simple, one portion, and the children of each deceased child should take, in fee simple, the share which their respective parents would have taken, if then living, thus excluding the representatives of Robert L. Deas and Zephaniah Deas who had both died without issue, in the life-time of the life-tenant. He, therefore, adjudged that the property be divided into six equal shares, of which James C. Deas, Maria S. Eaden, Eliza J. Ready, Jean-

nette A. Deas, and Mary Clara Mason should each take one share, and that the children of John S. Deas, deceased, should take, amongst them, the remaining share: and that the shares of James C. Deas, Jeannette A. Deas, Mary Clara Mason, and Eliza J. Ready, who had joined in the mortgage to Maria S. Eaden, should be charged with the mortgage debt.

From this judgment the defendants, Hannah G. Allen, as devisee of Robert L. Deas, and the defendant, Julia W. Deas, as one of the heirs at law of Zephaniah Deas, appeal upon the ground that the Circuit Judge erred in excluding them as such from any participation in the division of the property. The children of Mary Clara Mason also appeal upon the ground that the Circuit Judge erred in holding that they are not entitled to share with their mother the portion coming to the stock represented by her.

We agree with the Circuit Judge that Eliza C. Deas took only an estate for her life with remainder to her issue, the rule in *Shelley's Case* not applying for the reasons given. Indeed, this does not seem to be questioned by any of the appellants, and the main inquiry is as to the character of the remainders—whether they were vested or contingent, and if vested, whether they were liable to be divested by the death of any of the children, without issue, during the life of the life-tenant. The authorities in this State appear to be somewhat conflicting, but it seems to us that the more recent cases support the view that the remainders vested in such of the issue as were *in esse* at the date of the deed, at that time, opening to let in other issue as they came into existence, whose interests were also vested at their birth, and that such vested interests were not divested by the death of any such issue, leaving no issue, in the life-time of the life-tenant, and hence that the Circuit Judge erred in excluding the representatives of Robert L. Deas and Zephaniah from any participation in the division of the property.

*Myers v. Myers*, 2 *McCord Ch.*, 214; 16 *A. D.*, 648 (1827). The devise was to “my grandchildren, being the lawful issue” of my son David, “to them and their heirs forever.” At the date of the will David had two children, his wife being then pregnant with another, who was born previous to the death of testator. After the

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death of testator David had six other children; and the question in the case was whether these six were entitled under the will. The court held that the general rule was "that where there is an indefinite period for distribution, the legacy vests at the death of the testator, and that none can take except those *in esse* at that time. But that where there is a fixed period when the distribution is to take place \* \* \* then all the children born before that time will come in for a distributive share, and such as are subsequently born will be excluded." The court having determined that the period for distribution was the death of testator, held that the six *post nati* children were excluded. *Note.* It will be observed that the exact point raised here was not decided in that case, inasmuch as none of the children had died after the death of the testator, though the language used in stating the rule, "none can take except those *in esse* at the time" fixed for distribution would seem to exclude those who died before that time.

*Swinton v. Legare*, 2 *McCord Ch.*, 440 (1827), the legacy was to A for life, "and after her death to be equally divided among the survivors of her children, to each of them share and share alike, as they shall attain the age of 21 or marriage." The question was whether the children of Hugh, who was born in the life-time of testatrix, but died before his mother, the life-tenant, could take under the will. *Held*, that they could not, under the rule that "where property is given to a class of persons, and not by name, it will take in all who shall answer the description at the time the gift shall take effect." But from what is subsequently said in the opinion it would seem that this conclusion was due to the fact that the gift in remainder was, not to the children of the life-tenant generally, but to her *surviving* children.

*Cole v. Creyon*, 1 *Hill Ch.*, 311; 26 *A. D.*, 208 (1833), testator devised and bequeathed his estate to his wife for life, and at her death, "that it be equally divided between Henry and Elizabeth Cole's children, and Alex. Creyon, *viz.*, the offspring of said Elizabeth Cole's body, and no other, to be retained in the hands of my executors until the age of 21 years, or marriage, which shall first happen, then to be made over to them lawfully, each legatee receiving their just *quota* of the same, which I will and bequeath to them and their heirs forever." The only question in



the case was whether the Cole children took among them one-half and Creyon the other half, or whether they took *per capita*. Held, that Creyon took half and the Coles the other half. But while this was the only point decided, the reasoning of Harper, Ch., throws light on the question we are concerned with. (See his reasoning, as well as the cases which he cites, viz., *Godfrey v. Davis*, 6 Ves., 49; *Hughes v. Hughes*, 14 Id., 256.) But the learned chancellor adds: "There would be reason for making a different construction, and probably a different one ought to be made, when the child dying (before the period for distribution) has left children, and this also to effectuate the intention, for it cannot be supposed that the testator intended the object of his bounty not to be capable of transmitting to his children so as to provide for them."

*Conner v. Johnson*, 2 Hill Ch., 41 (1834), the devise was to the wife for life, and after her death to seven named persons and the children of Elizabeth Carn (now Mrs. Conner), and the question was how the estate in remainder was to be divided. Held, that the division was to be into eight shares, of which each of the persons named would take one, and the remaining share would go to such of the children of Elizabeth Carn as were living at the time of the death of the life-tenant, excluding such of the said children as predeceased the life tenant. This was upon the ground that the shares vested at different times—those of the remaindermen who were *named* vesting at the death of testator, while the share given to a *class of unascertained* persons—the Carn children—could not vest until the death of the life-tenant, and hence any child of Mrs. Carn who died before the life-tenant had no transmissible interest.

*Rutledge v. Rutledge*, Dud. Eq., 201 (1838), property was settled by a marriage settlement for the joint use of husband and wife, and the survivor of them for life, and after the decease of both to the use of the issue of the marriage, to be divided amongst them, share and share alike; if no issue of such marriage, or if such issue should die during the lives of husband and wife, or during the life of the survivor, then to the use of such survivor, his or her heirs and assigns forever. The immediate issue of the marriage were seven children, of whom three died

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during the lives of their parents, intestate and without issue, the father then died, leaving his widow and four children surviving. Of these two died during the life of the widow without issue and unmarried; another, Edward by name, leaving his widow and six children surviving; and another, Nicholas, died, leaving his widow but no child. The mother then died, leaving no other issue of her body but the six children of Edward. The question was whether the issue of Edward took the whole estate, or whether the widow of Nicholas could come in; and this depended upon the question whether the issue of the original marriage took as they were respectively born vested and transmissible interests, and it was held that they did, but somewhat strange to say, it was also held that the estate was distributable *per capita*, and not *per stirpes*, viz., that it was to be divided into thirteen equal parts, of which each of the children of Edward took one part, and the representatives of each of the other children who had died without issue took one equal part. This case appears to be exactly in point, and is in conflict with the reasoning of Harper, Ch., in *Cole v. Creyon* and *Conner v. Johnson*, to which no allusion is made.

*Bentley & Bradley v. Long*, 1 *Strob. Eq.*, 43; 47 *A. D.*, 523 (1846), the devise was to the wife during life or widowhood, "and at her death or marriage to be equally divided amongst our children." One of the children, Henry, survived the testator, but predeceased the life-tenant, and the question was whether his interest was so vested as to pass to his administrator. *Held*, that it was, on the authority, solely, of *Bankhead v. Carlisle* (1 *Hill Ch.*, 357), as no other authority is cited and no reason given. But on turning to the case of *Bankhead v. Carlisle*, it will be found that there the testator, after giving specific legacies to his ten children, of whom Gideon was one, devised to his wife during her life or widowhood all the rest of his estate, and at her death or marriage "to be equally divided amongst my children *as above named*," and the fact that the children were *named* seems to have been the turning point of the case.

*Wessenger v. Hunt*, 9 *Rich. Eq.*, 459 (1857). Testator gave his property to his wife for life, and at her death to be equally divided among my children and grandchildren, excluding certain

of them by name; one of testator's children, Richard, predeceased the life-tenant, leaving no issue, and one of the grandchildren, and perhaps another, was born after the death of the life-tenant. The chancellor on Circuit held that the representatives of Richard and the children and grandchildren living at the death of the life-tenant (except those specially excluded), were entitled to share equally in the distribution of the property, which should be *per capita*, and not *per stirpes*. On appeal no question seems to have been made as to the right of the representatives of Richard, who had predeceased the life-tenant, to share in the division, the only questions being: 1st. Whether any grandchildren could come in except those who were living at testator's death. 2d. Whether the distribution should be *per capita* or *per stirpes*. The court held that all the grandchildren who were in being at the death of the life-tenant, the period fixed for distribution, were entitled to come in—the court saying that the rule was that “where the partition is postponed by the interposition of a life estate, or to some future day for any other cause, all who can bring themselves within the description at the period of distribution are entitled to participate in the distribution.” NOTE.—If this be the rule, it is difficult to see how the representatives of Richard could come in, as they certainly could not bring themselves within the description—children or grandchildren—at the period of distribution, though Wardlaw, Ch., in the Circuit decree, does say: “It is clear on authority that the children and grandchildren of testator living at his death took vested interests in the remainder, transmissible to their representatives, subject to diminution by increase of the objects of bounty, or, in other words, vested estates, opening to let in all of the classes who might come into existence before the period of distribution.” And then proceeds to state the rule where the subject of the bequest is to be distributed at a time future to the death of the testator, as, for instance, at the death of an intermediate life-tenant, pretty much as it is stated in the foregoing quotation from the opinion of the Court of Appeals.

*Wilson v. McJunkin*, 11 Rich. Eq., 527 (1860), appears to be precisely like the case under consideration, with two exceptions: 1st. That the limitation was by a will, while here it was

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by deed. 2d. There the remainder was to the *children*, while here it is to the *issue* of the life-tenant. In that case testator devised certain property to his executors in trust for the sole and separate use of his daughter, Nancy, for life, "and at her death to be equally divided amongst her children in fee simple." One of Nancy's children, Mary, who was living at the time of testator's death, died during the life of her mother, leaving a husband but no issue, and the question was whether the representatives of Mary could take her share upon the death of the life-tenant. Held that they could, her interest being a vested transmissible interest. Chancellor Dargan, in his Circuit decree, which was simply adopted by the Court of Appeals, after stating the question, said: "I had thought [this question] so well settled as not to admit of controversy or serious doubt; so plain is it, in fact, that it does not, so far as I am informed, seem to have been raised in any reported decision in South Carolina. But when we turn to the English authorities, we find the principle so well settled as to account for the question not having been raised in our courts." The only case which he cites is *Doe v. Perryn* (3 T. R., 484), where the reason given is that any other conclusion would defeat the interests of grandchildren, which reason would not apply in our case, where the remainder is to the issue, which would include grandchildren.

*Haynsworth v. Haynsworth*, 12 Rich. Eq., 114 (1860), was a case in which a donor by deed conveyed certain property to a trustee for the sole and separate use of the donor's granddaughter, M., wife of H., for life, and after her death to the use of H. for life, and after his death to the use of the children born, or to be born, of said M., and their heirs, but should the said M. and H. both die without leaving children living at the time of their decease, born of the said M., then over to two other grandchildren of the donor. M. died leaving H. and one child surviving her, and then the child died, leaving H. surviving him. Held, that the child took a vested transmissible interest, which became indefeasible on the death of M., upon the ground that the limitation over could only take effect in the event of *both* M. and H. dying without leaving a child, and as *one* of them—M.—died leaving a child, the limitation over never could take effect. The

implication is, that if the child had died while both M. and H. were alive, his vested interest would have been defeated. In this case *Rutledge v. Rutledge*, *supra*, is relied upon to show that the child took a vested interest.

*Hayne v. Irvine*, 25 S. C., 289 (1886). Testator gave to his two daughters, E. and M., certain property, real and personal, and in case "either of them should die without issue lawfully begotten, and living at their, or either of their, deaths, then, and in that case, all the property \* \* \* shall be given to the lawful heirs of my daughters, Mrs. Nancy Hill, the wife of William R. Hill, and Mrs. Frances Irvine, the wife of Dr. O. B. Irvine, to be divided equally between the children of my said daughters, Mrs. Hill and Mrs. Irvine, to have and to hold to them and their heirs forever, share and share alike." Mrs. Irvine died, and then Pinckney, her son, died, leaving children, and afterwards both E. and M. died without issue. The question was whether the children of Pinckney could come in and share with the children of Mrs. Irvine living at the time of the death of E. and M. The court, after saying that the terms "heirs" was used, not in its technical sense, but as synonymous with the term "children," held that as the issue of Pinckney did not answer the description of *children* of Mrs. Irvine, those who did answer that description at the time of the death of E. and M. took to the exclusion of Pinckney's children, under the authority of *Wessenger v. Hunt*, *supra*, which, it is said, established the doctrine "that a bequest to be distributed at a future time to the death of the testator, to wit, at the death of an intermediate life tenant, all who answer the description at the time of the distribution are the parties alone entitled." It will be observed that Wardlaw, Ch., does not use the word "alone" in the case relied on; but, on the contrary, he held that the representatives of a child who had predeceased the life-tenant were entitled to come in. It will also be observed that the intermediate estate of E. and M. was not a life estate, but so far as appears an estate in fee, and the limitation over must be regarded as an executory devise, and not as a remainder.

*Doe ex dem. Barnea v. Provoost* (4 Johns. Rep., 60; 4 A. D., 249), is a case of high authority, where the testator devised real

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estate to his daughter, C., "for and during the term of her natural life, and immediately after the death of the said C., I give the above devised premises unto and among all and every such child and children as the said C. shall have lawfully begotten at the time of her death, in fee simple, to be equally divided between them share and share alike." It was held that the four children of C., who were living at the date of the will, and at the death of the testator, took vested remainders, which opened to let in other children of C. subsequently born, and hence that the children of a daughter who predeceased the life-tenant were entitled to the share which their mother would have taken if she had survived the life-tenant. Spencer, J., dissented, holding that the remainders to the children of C. were contingent, and hence the children of the deceased daughter were not entitled to anything.

If the remainder once vested in Robert L. Deas, we see nothing in the terms of the deed which would divest it in case he should die during the life-time of the life-tenant without issue; for there is no limitation over in case such an event should happen, but, on the contrary, the remainder vested in him was a fee simple, and if his estate became divested by reason of his death during the life of the life-tenant, it must necessarily have reverted to the grantor—a construction which would be wholly inadmissible. It will be observed that the remainder is to the issue of Eliza C. Deas, *not* to her *surviving* issue, or to her issue *then living*, which would have been the words that most naturally would have been used if the intention had been to confine the gift to such issue only as might be *in esse* at the time of the death of the life-tenant; but, on the contrary, as we have said, the remainder is to the issue generally in such terms as import a fee simple, which was to vest *in possession* at the time of the death of the life-tenant, and hence, as was said in *Rutledge v. Rutledge, supra*, "necessarily all falling within the description of issue up to that time are entitled to an equal participation in the estate."

Indeed, we do not see how this case can be distinguished from that, and we do not see that any subsequent case has in any way shaken its authority; but, on the contrary, we do find it expressly recognized in the comparatively recent case of *Haynsworth v. Haynsworth, supra*. The only point of difference between this case

and that of *Rutledge v. Rutledge* is that there there was a limitation over in the event that there was no issue of the marriage, or in the event that all of such issue should die during the life of the husband and wife, while here there is no such limitation, but this only makes the present case stronger than that. So, also, the case of *Wilson v. McJunkin*, *supra*, is, in principle, the same as the present case; for we do not see how the points of difference hereinbefore pointed out, can affect the present inquiry.

The only remaining inquiry is that raised by the appeal of the Mason children. Although this question does not seem to have been considered by the Circuit Judge in his decree, yet as he directed such a mode of division as would exclude the children of Mrs. Mason from any participation therein, we suppose it is competent for them to raise the question by appeal. There is no doubt that the term "issue" generally includes all lineal descendants, and is a much more comprehensive term than "children" or "grandchildren." Hence if the remainder here had simply been to the issue of Eliza C. Deas, with nothing more, the children of Mrs. Mason being a part of such issue, would have been entitled to share in the division of the property at the termination of the life estate, in which case all who could bring themselves within the class described as issue would have been entitled to share equally in such division, which would have been *per capita*, and not *per stirpes*. See *Wessenger v. Hunt*, *supra*, and the cases therein cited.

But while this is the general rule, yet it is well settled that where there is anything in the context indicating an intention to restrict the broad signification of the term "issue," it will be so restricted. *Burleson v. Bowman*, 1 *Rich. Eq.*, 111. Now, in this case the remainder is not simply to the issue of Eliza C. Deas, but it is "to her issue to take *per stirpes*, their heirs and assigns," and the practical inquiry is, what is the effect of the superadded words? One effect, undoubtedly, is to prevent a division *per capita* amongst the issue of the life-tenant; but we think another manifest effect of these superadded words is to confine the division to the *immediate* issue, and the children of such immediate issue as predeceased the life-tenant, who can only take *per stirpes*, as *representatives* of their deceased parents.

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There is nothing whatever to indicate that there is to be any subdivision of any of the shares, and as it is perfectly certain that the division must be *per stirpes*, and not *per capita*, we think it necessarily follows that the children of Mrs. Mason, who is still living, have no right to participate in the division, but that their mother is alone entitled to the one-eighth of the property which, under our view, goes to that branch of the issue.

The judgment of this court is, that the judgment of the Circuit Court be reformed in accordance with the views herein announced, and that for this purpose the case be remanded to the Circuit Court.

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TATE, MULLER & WITTICHEN v. MARCO & LEWENTHAL.

1. Defendants accepted the agency to sell guano for plaintiffs, the stipulated price to be paid by the buyer "in middling cotton from the first pickings" of that year, and to be secured by "a special lien upon his entire crop of cotton and corn to be made during the year." Held, that it would have been bad faith in the agents to sell to farmers who had given to strangers a prior lien upon their crops, but especially where the agents themselves held such prior liens are they liable to their principals for the uncollected notes of such buyers.
2. The principals having the right, under their agreement, to take possession of all the guano notes, they did not, by taking possession, confirm the acts of their agents or thereby make a settlement of accounts; but having by so doing prevented their agents from collecting, and in one case accepted a compromise, they cannot hold the agents liable for the amounts uncollected on these notes.

Before COTHRAN, J., Darlington, October, 1886.

The opinion states the case.

*Mr. R. W. Boyd*, for appellants.

*Messrs. Dargan & Dargan*, contra.

November 28, 1887. The opinion of the court was delivered by



MR. JUSTICE MCGOWAN. This was an action for fifteen hundred dollars damages, alleged to have been sustained by the plaintiffs from the misconduct of the defendants, as agents, under the following circumstances: The plaintiffs, of Baltimore, copartners in manufacturing and selling fertilizers, employed the defendants as their agents to sell in Darlington, S. C., by a contract in writing, which was contained in a letter of plaintiffs to the defendants and accepted by them; and contained, among other things, the following:

"You (defendants) will sell our (plaintiffs') fertilizers on the following terms and conditions only, and no charge will be made, except with our authorization, and we reserve the right to change the terms whenever we deem it proper. The ton of 2,000 lbs. in bags in your warehouse, of 'the Equitable Ammoniated Sol Bone Phosphate of Lime,' for 475 lbs. middling cotton. \* \* \* The cotton to be in good and dry condition, and delivered for our account in merchantable bales on or before the 1st November, 1882, on the cars at your depot, Darlington, S. C., and meanwhile to be represented by notes, or notes and liens (as the laws of your State permit), of the purchasers drawn to our order (on blanks to be furnished by us), and to be taken by you from the purchasers at the time of the delivery of the fertilizers, and promptly to be forwarded to us, not later than the 1st May, 1882. The purchasers having the right to pay for these cotton obligations at any time previous to their maturity, in money, at the rate of 15 cents per pound of cotton, but this option will cease and determine on the day of maturity of said cotton obligations. \* \* \* Upon our request you will at any time receive back from us for safe keeping and collection any or all of said cotton notes without any extra charge. You will promptly forward to us all the cotton collected by you for our account, or hold the same under insurance," &c., &c.

The plaintiffs alleged that under this agreement they shipped to the defendants fertilizers to the value of \$5,223.57, but that they, "in violation of the terms of the agreement, sold and delivered a large proportion of the fertilizers to parties who were known by the defendants to be utterly insolvent, and with whom the defendants were doing business, and to whom they had made advances, and against whom the defendants held mortgages and agricultural liens, covering the whole value of the property owned by said parties, and exceeding the probable value of any

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crops which, even under the most favorable circumstances, could have been made or raised by the respective parties during the said year"; and "that the fertilizers so sold and delivered by the defendants were delivered to the customers of the defendants with the view solely to the benefit of themselves; they, the defendants, well knowing that a great part of the sale so made would result in utter loss to the plaintiffs," &c., &c. And that in consequence of the failure, neglect, bad faith, and fraud of the defendants, they had sustained damage to the amount of \$1,500, &c.

The defendants answered, admitting the receipt of a certain amount of fertilizers, but claiming that the plaintiffs were not entitled to any relief; and if so, such relief was equitable, and not legal, as prayed for; and also that on December 14, 1882, the whole matter of the agency was finally "settled" and the securities turned over to the plaintiffs, except a note of the defendants to the plaintiffs for \$144, which was not paid on that day, only for the reason that it was then in Baltimore; that afterwards defendants made a payment on the note, and have been, and are now, ready to pay the balance. They offered to allow judgment to be taken in the action for the balance of the note, viz., \$95.58, with interest, &c.

The issues were referred to B. W. Edwards, Esq., as special referee, who took a great mass of testimony, which is in the Brief. It seems that the blanks to be provided by the agreement for the cotton notes to be taken, contained the following: "payable out of the first picking of cotton." \* \* \* And also "that this is, and shall be, a special lien upon my entire crop of cotton and corn to be made during the year 1882," &c.; and that the defendants, in taking notes for the fertilizers, did use the form of lien obligation furnished by the plaintiffs, except in the single case of H. Williamson, of which more will be said hereafter.

The referee found as matter of fact: "That under the terms of contract itself the plaintiffs had the right to take the notes out of the hands of the defendants at any time; that there was no 'settlement' between Mr. White, agent of the plaintiffs, and the defendant, Lewenthal; that White did not give Lewenthal the Williamson note in lieu of the commission, but that Lewenthal

took said note and retained it ; that the defendants had ample means from the crop of Williamson, agent, to pay the note, and it was a prior lien on the first cotton picked out ; that the defendants were responsible for the loss sustained on the G. Richard note by the plaintiffs ; and that cotton which plaintiffs should have received on the guano notes was worth 10 cents per pound ; and that the defendants in a great many cases, if not in all, with the exceptions herein noted, received cotton which they applied to their own accounts, and in some were paid their liens, but applied the cotton to other advances made outside of the lien accounts," &c.

And he held as matter of law that the defendants were liable for the guano note lien of H. Williamson, agent, which was an express lien "on the first cotton picked out" ; that they were liable for the balance on the L. G. Byrd note, which they could have collected ; and that they were also liable on all the other notes (excepting those of Charles Dargan, W. T. Alston, David Gattison, and Joseph Wright), "for the reason that the sale of the guano was, in most instances, for their (defendants') benefit, the same being used by their customers, who, in many instances, were also their tenants, and many of whom owed them large debts ; and the guano note liens were prior, being 'on the first cotton picked out,' as they were taken by them as agents of the plaintiffs, with full knowledge, and by their own act and consent," &c. According to this view, the referee found that the defendants were due the plaintiffs the sum of \$1,023.08.

Upon exceptions this report came before Judge Cothran, who confirmed it and rendered a decree for the amount so found ; and from this decree the defendants appeal to this court upon the following grounds :

"I. That it was error to hold that because defendants, as agents of plaintiffs, took from the vendees lien notes, 'payable in middling cotton (475 lbs.) from the first picking,' &c., they thereby waived the priority of lien taken by them for their own benefit prior to the inception of the agency, when the evidence was plenary that no such waiver was intended by the defendants or understood by plaintiffs to have been made.

"II. That it was error to hold that the relation of principal

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and agent required the defendants to waive in favor of plaintiffs the priority of liens acquired prior to the inception of the agency.

"III. That it was error to sustain the referee in holding that defendants became liable for the guano note of H. Williamson, agent, upon the perfection of the transfer by Mrs. Williamson to them.

"IV. That it was error to sustain the referee in holding 'that defendants were liable on the L. G. Byrd note, for the reason that, according to their own testimony, they could have collected said note from Byrd, and this they were bound to do,' when the testimony showed only that they could have collected it if plaintiffs had left it in their hands for collection.

"V. That it was error to sustain the referee in holding defendants liable for the loss on the G. Richard note by a compromise made by plaintiffs.

"VI. That on the undisputed facts of the case, and the law applicable to the same, it was error to hold and adjudge that plaintiffs are entitled to judgment for the sum of \$1,023.23," &c.

The exceptions make no reference to the suggestion of the answer, that this is really a legal action "on the case" for damages for fraud and misconduct on the part of the defendants as agents of the plaintiffs. If it were such, this court would have no right to review any fact decided. The case seems to have been treated by all parties, including the referee and Circuit Judge, as a suit in equity by principals for an account against their agents.

Exceptions 1, 2, and 3 complain that it was error to decree that the defendants must be held to have waived the priority of their individual liens upon customers, to whom they as agents afterwards sold fertilizers on notes made "payable in middling cotton from the first picking," &c. The terms of the liens taken for plaintiffs were manifestly inconsistent with the existence of prior liens upon the crop of the purchasers. If, however, such liens were taken where there were prior liens held by strangers, such lienees could not be required to waive their liens in favor of the plaintiffs, although their liens called for "cotton of the first picking," &c. But we do not understand that the same princi-

ple applies where the owners of the first lien take the second as the agents of a third party. This is a question between the principals and their agents, who placed themselves under obligations to sell fertilizers "only" on the terms and conditions that the cotton notes were to be drawn to the order of the principals according to blanks furnished, which contained these stipulations—"payable in middling cotton from the first picking"; and also that "this is a special lien upon my entire crop of cotton and corn to be made during the year 1882." The agents used the blanks as required, but it seems that they used them in cases where they knew that the lien could not be enforced according to its terms, but was probably no more than idle words.

We incline to think that this itself was bad faith to their principals, and in our view was certainly so in cases where the agents themselves were the holders of the prior agricultural liens, and in taking such delusive second liens must have known that, while the crops, upon which they held the prior agricultural liens, would be benefited thereby, the plaintiffs, for whom they acted, could not enforce their liens, according to their express terms. The arrangement in substance was, that the fertilizers should be sold "only" on first liens on the crop. Possibly, as suggested, the defendants might have found difficulty in disposing of them on those terms, but that could not justify a departure from the agreement. In that case their proper course was to retain the property undisposed of, unless the plaintiffs expressly relaxed their requirements, of which we see no evidence. The law requires perfect good faith on the part of agents, not only in form, but in spirit and substance. A distinguished writer on Equity Jurisprudence has summarized the law upon the subject of principal and agent as follows: "Equity regards and treats this relation in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary. The underlying thought is that an agent should not unite his personal and representative characters in the same transaction; and equity will not permit him to be exposed to the temptation or brought into a situation where his own personal interests conflict with the interest of his principal, and with the duties he owes to his principal. In dealings without the intervention of his principal, if

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an agent for the purpose of selling property of the principal, purchases it himself, or an agent for the purpose of buying property for the principal, buys it for himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable: it will always be set aside at the option of the principal. \* \* \* Any unfairness, any underhand dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal," &c. 2 *Pom. Eq. Jur.*, section 959 and notes. The wronged principal is entitled at his option to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him. See notes to 2 *Pom. Eq. Jur.*, *supra*.

By the contract of agency the lien notes were made payable to the order of the plaintiffs, to be forwarded promptly to them. On December 14, 1882, the plaintiffs (through their agent White) took possession of all but the Williamson note. While we concur with the referee and Circuit Judge, that the act of taking possession according to the terms of the contract, did not amount either to a confirmation of the acts of the agent, or a "settlement" with them, we can well see how it might affect the question of responsibility for failing to collect. As we understand it, the notes of Richard and Byrd were among those which were taken out of the hands of the defendants by the agent of plaintiffs; that the attorney of the plaintiffs made efforts to collect them, but not succeeding as to the whole debts, the balances not collected were charged against the defendants, on the ground that the notes could have been collected, but were not. Assuming that the notes were good when taken, it seems to us that the defendants should not have been charged for failing to collect them after the plaintiffs took control of the notes. It is true that, after the plaintiffs took possession, their attorney advised with the defendants as to the collection of the notes; but it does not clearly appear that there ever was any distinct offer to return the notes to them "for collection." Besides, as to the Richard note, the regularly authorized attorney of the plaintiffs received the sum of \$560.25, and compromised the same; we do not think that the

defendants should be charged with the uncollected balances upon the notes of Byrd and Richard.

The judgment of this court is, that the judgment of the Circuit Court be affirmed, with the modification indicated as to the Richard and Byrd notes.

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BROWN v. THOMSON.

1. A married woman is responsible for articles purchased by her for the use of a plantation which was her separate estate, and judgment therefor may be entered against her.
2. But a married woman cannot be held liable, in an action at law, for goods purchased by her for the use of herself and family, even though the sale was made on the faith of her pledge of her individual credit.

Before HUDSON, J., Spartanburg, September, 1886.

This was an action by John J. Brown against Jessie M. Thomson, commenced January 13, 1886, on an account for goods sold in the years 1883 and 1884. A bill of particulars was served, giving items of account, some of which appeared to have been delivered to the husband of the defendant, and some to her children. The answer alleged want of knowledge of the facts, payments made, and that at the time of the alleged purchases, and now, the defendant was and is a married woman. The cause came on for trial before Judge Hudson and a jury. The plaintiff proved the account in the usual way; that he had dealings with defendant prior to 1884, and ever since; that defendant settled her account for 1883, except about 4 or 6 dollars; knew she was a married woman, and the credit was given to her; refused credit to her husband, because heard that all the property was in her hands—she said she wanted the goods, some for the plantation and some, I suppose, for her house; her husband, W. W. Thomson, got some of the items—I have an order recognizing what he got; except for the bacon and ploughs, a good deal of the account is for family supplies; bacon and flour is the principal part; a good deal of the account, no doubt, for family supplies; I don't know

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what she did with it ; I did not ask her when she got it, whether it was going to the plantation or the house ; she bought many of the things herself ; was there in store very often ; her husband got a good many things charged to her ; she recognized it ; her children got too ; her plantation was in York County ; she wrote me a letter of which the following is a copy :

“MAJOR BROWN: Some time since I received your note, and have not felt able to answer it till now. I want to say, Major, in confidence and not boasting, but as a matter of business, that I own property in York County to the value of \$30,000, and there is not a lawyer there who will not tell you that my name stands high financially, and, moreover, the most moderate judges place our growing crop at one hundred and fifty bales as a low figure, and as certain of that, with no natural disaster. Mr. R. Thompson, who is always moderate and safe in his estimates, places our crop as above, while many go over this. I state this to show our ability to meet our obligations, and I now wish to say that I propose to settle fairly and to your satisfaction every dollar due you, and to make the proper difference between cash and time prices, on account of our disappointment in not paying you, caused by our not getting money firmly promised. Mr. Thomson says we ought to pay the time price, and when we settle you will be perfectly satisfied, as we will charge our tenants the same you charge us, and it will not be our paying it really. We have traded with you and got along so friendly, and you can rest perfectly assured that our settlement this fall will be prompt and satisfactory. We prefer trading with you, as we stated, although we shall want but little. One of our tenants is here now, and wants fifty pounds of bacon, which I should like to get from you. Please state what you will charge for this, payable Nov. 1st. Hoping that what I have written will prove satisfactory, I remain, very respectfully, (Signed) Mrs. J. M. Thomson. July 12, 1884.”

The witness proceeded: “I know of no property that her husband owns ; he does nothing that I know of but attend to his wife’s business ; he is a lawyer ; I had refused to sell her unless she paid time prices ; she knew that items in account of 1883



were charged to her—she paid it; I credited her for what she wanted after I got this letter," &c.

T. H. Littlejohn testified that items in the account, to the amount of \$168.50, were for the plantation, and hardware for the house.

The defendant offered no evidence, but made certain requests to charge, which are all noticed in the charge of the judge, which was full and clear, and was as follows:

Gentlemen of the Jury: This case presents a very interesting question, and one of vital importance to the community. The action is by the plaintiff, J. J. Brown, a merchant, against Jessie M. Thomson, upon a mercantile account, a store account, goods sold and delivered and charged to her. He seeks to hold her personally liable for the amount, and upon this personal liability as a married woman hangs principally the determination of this case. The law in South Carolina touching the power, the capacity, and the liability of a married woman is found in sections 2036 and 2037 of the General Statutes. That is the law governing this case. There is no question that a married woman has the right to purchase any species of property in her own name, just as much so as if she were unmarried, and the right to purchase necessarily carries with it the right to pay the cash, or purchase on credit, and give a valid obligation for the payment of the purchase money. If she had not the right to buy on a credit, giving her personal obligation therefor, which could be enforced upon her in a court of law, her power to purchase would be greatly curtailed. And the legislature has left it unlimited, and the power to purchase any species of property necessarily carries with it the power to give a valid obligation to pay the purchase money, upon which obligation she can be sued in a court of law, and judgment recovered against her.

In addition to this power of purchase, she has a right to contract and be contracted with, as to her separate property. She can make a contract in reference to that separate property and can bind herself personally when the contract has reference to that personal property just as if she were unmarried. That is the statute. Now the question, therefore, is: did this married lady purchase the goods sold and delivered in this store account

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upon which the action has been brought? Did she make the purchases? We have nothing but the evidence introduced by the plaintiff. The defendant introduces no evidence. \* \* \*

Now the question is, first and foremost, it is at the foundation of the whole of it: was this account contracted by this married lady? If the account was contracted by her, if the purchases were made by her, either in person or by her servants as her agents, or by the members of her family as her agents, she having knowledge of it and constituting them her agents to make the purchase; I say, if that was the case, then it was her contract; and in so far as the articles were purchased which went to the use of her plantation, unquestionably the articles were for the benefit of her separate estate, whether it was to pay hands their wages, or whether it was to purchase implements and material for repairing about the plantation or about her real estate in the city of Gaffney, that would be unquestionably for the benefit directly of her separate estate. It would be a contract as to her separate property, and for the benefit of it, because otherwise a married lady owning large property would be helpless; she would be without credit, if she could not go and buy on a credit for the benefit of that plantation for the purpose of keeping it up, perhaps of "running it," to use a popular phrase. The plantation would be comparatively worthless to her.

And, furthermore, there are many cases in the land where most excellent men and good managers are not the owners of property, but they have wives who do have property. Now, that husband is primarily liable for the support of his wife and children, and the wife cannot be made liable for the support of herself and children without a contract of her own to that effect. The husband may be an excellent manager, managing the separate property of his wife judiciously, most satisfactorily, yet being himself without tangible property, he has no credit. And if the support of his wife and children depended alone upon his credit, why, they might in many cases suffer, whereas the only fault that he has is that he is not the owner of separate property and has not credit. Now, in such a case as that, can the wife come to the rescue, and can she contract and make herself and her separate property liable by contract for the benefit of

herself, the support and maintenance of herself and her children, her family generally, even including her husband?

I must take a plain, practical, common sense view of this statute. A great deal of learning has been displayed by the courts of the different States in the Union upon these statutes in regard to married women's property. I propose to take the same view of that act as is taken in this New York case, which has been cited to you, which I think is eminently sound, practical, and full of good sense, and that is, if the wife goes and makes the contract (that is the fundamental question), whether she does it in express words or not—if, I mean, she makes a contract in the legal sense of the word, if she goes and makes a contract, if she has a merchant to sell the articles and charge them to her, and if she promises to pay for them, and those articles are for the support of herself and her children, I say under this act that she then has purchased goods for which she is personally liable. The law gives her a perfect right to purchase. If the husband is an invalid and has no means, the wife has a right to come forward and make a contract of that kind, make purchases for the benefit of herself and children, and give an obligation to pay for those purchases. She is not bound, she is not tied; her hands are not tied so as to render her unable to support herself and family, but the law here is broad enough. The only thing in all these questions that we must look carefully at is, "Is it a contract of the married woman?" If it be a contract, and a contract of purchase, she is responsible, if it is by her. If it be a contract having reference as to and for the benefit of her separate estate, she is personally liable, for the statute says so.

The language here of this case I will adopt in my charge to you. "Out of this right to purchase inevitably flows her liability for the price. That right was broadly given without limit or restriction, and intended to be completely and beneficially given. It was not narrowed to a purchase for cash or a consideration paid down in full, but she was at liberty to purchase as freely as a man might purchase, and on credit, if she should so choose. That involves her personal liability; without that credit is impossible—without that we should be held to the absurd proposition that the wife might buy, but should not be bound to pay, and as

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a practical consequence we should restrict her right to purchase, which the statute gives fully and without restriction."

Now, I am asked by the defendant's counsel to charge you the following propositions. The first proposition is as follows: "The onus of proof is on the plaintiff to show that the contract sued upon relates to or concerns her separate property." I charge you that that is correct. The plaintiff must prove either that it was a purchase made by her, or that if it was not a contract to purchase, it was nevertheless a contract having reference to, relating to, her separate property.

"Second. Household supplies purchased by a married woman do not constitute such a debt as can bind a married woman in a suit at law." I decline to charge you that proposition. I contend that she can buy household supplies just as well as she can buy land.

The next proposition is: "The purchase of goods by a married woman for tenants on her place is not such a contract as will bind a married woman in a suit at law." I decline to charge that proposition, but charge you just the contrary, that she can buy supplies for her plantation, she can make contracts for the payments of wages of her hands, and that supplies and goods bought by her for the support and maintenance of her plantation are valid contracts, for which she is personally liable.

The next proposition: "Nothing can be found against a defendant if she is a married woman and did not contract as to her separate estate." That is a correct proposition, if we add thereto, "or did not make the purchase of the goods." If she purchased the goods, she is liable. But the proposition is, as it stands here, correct. Every contract for which she is to be liable, must be a contract as to her separate property, if it relates to property at all. But her straight out and out purchases she is liable for.

"In this case, in no view of the testimony in the case, can the jury find a verdict for more than \$170." "Under the testimony here the verdict must be for the defendant." I cannot charge you that proposition, but, on the contrary, I charge you again that for whatever amount of these goods that were bought for the benefit of her separate property, she is liable; bought by her, the contract must be by her, either in person or by an agent, and

then she is liable for the balance, whatever went to the support of herself and children, if she herself made the contract either in person or by agent, and it was credited to her.

The next proposition: "Contracts such as have been testified to in this case will not bind the separate estate of a married woman." That I refuse. Now, don't misunderstand me. A married lady going to a store and buying goods, does not by that means imply a contract that she is to be responsible—not at all. But, on the other hand, the implication is that the husband is responsible, because every husband is primarily responsible for the support of his family. So that the married ladies, when they go about here in these stores and buy goods, everything is charged to their husbands, unless there is a special contract with that married lady. But if the merchant does not give credit and will not give credit to the husband, and makes a special contract with that married lady for all her purchases, extends the credit to her with the distinct understanding with her, then she is liable. That is the law as I take it to be. Now, in this case it is for you to say whether the merchant here dealt with Mrs. Thomson and gave credit to her with her knowledge and with her consent, or did he give credit to the husband and then afterwards charge the wife, or did the wife know nothing about it. To bind her it must be that he gave credit to her, she knew, consented to it, asked for it.

The amount of the account seems not to be disputed. I understand that the account has been testified to in such a way as to prove it. The complaint, which will be handed to you, shows what the account is. No interest runs on this account. So that if you see that these are purchases fairly and squarely made by this lady, credit being given her, why she is liable, not only for those things which went to the support of her plantation, but which went to the support of herself and children. If they were not made by her, and the husband was the one whom the merchant dealt with and gave credit to him, you can't charge the wife.

Take the record. If you find for the plaintiff, find the amount which has been proved to be due. If you find for the defendant, say, "We find for the defendant."

The jury found for the plaintiff his whole account, \$366.95,

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and the defendant appealed to this court upon the following exceptions:

"1. In refusing to charge that household supplies purchased by a married woman do not constitute such a debt as can bind a married woman in a suit at law.

"2. In refusing to charge that 'the purchase of goods by a married woman for tenants on her place is not such a contract as will bind a married woman in a suit at law.'

"3. In refusing to charge that 'in this case, under no view of the testimony, can there be a verdict for more than \$170.'

"4. In refusing to charge that 'under the testimony the verdict must be for the defendant.'

"5. In refusing to charge that 'contracts such as the one in this case will not bind the separate estate of a married woman.

"6. In charging that the right to purchase conferred by the statute upon married women carries with it the right to purchase on credit and give a valid obligation for the payment of the purchase money.

"7. In charging that upon such obligation she can be sued in a court of law and judgment recovered against her.

"8. In charging that 'the question is therefore—did this married woman purchase the goods sold and delivered in this store account, upon which this action has been brought?'

"9. In charging in reference to matters of fact—as to what was the contract made by defendant, and as to defendant obtaining all the goods charged, and that all the items charged were purchases made on her account.

"10. In charging that in so far as the articles were purchased which went to the use of her plantation, they were for the benefit of the separate estate of defendant.

"11. In charging that if the wife makes a contract, whether in express words or not—if she had the merchant to sell the articles and charge them to her, and she promises to pay for them, and these articles are for the support of herself and children, then she has purchased goods for which she is personally liable.

"12. In refusing to charge that 'nothing can be found against a defendant if she is a married woman, and did not contract as to her separate estate.'

"13. In charging that on a contract made by a married woman, either in person or by agent, she is liable for whatever went to the support of herself and children, and it was credited to her.

"14. In charging that if the merchant does not give credit to the husband, and makes a special contract with that married lady for all her purchases—extends the credit to her with the distinct understanding with her, then she is liable."

*Mr. J. S. R. Thomson*, for appellant.

*Mr. Ralph K. Carson*, contra.

November 29, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The action below was brought on an open account, alleged to have been contracted by the defendant with the plaintiff for certain goods, wares, and merchandise furnished by plaintiff to said defendant. The account may be divided into two parts, the first, embracing certain articles for the use of the defendant, her husband and her children, and the household; the second, certain articles for the use of the separate estate of the defendant. His honor, the Circuit Judge, charged that if the defendant induced the plaintiff to sell the articles mentioned on her credit, and the credit of her separate estate, that then she and her separate estate were responsible as well for the articles purchased for the support of herself, husband, and children, as for those which she sent directly to her plantation.

We concur in so much of his charge as held the defendant responsible for the articles sent to her plantation, and if nothing more was embraced in the judgment below, it should be affirmed. But we do not concur in the other portion of the charge, which held the defendant responsible in this action for those articles used by herself and family. And the action below being an action at law, the judgment below cannot be modified so as to affirm it only in part. It must be reversed and remanded for a new trial, so that the account for the supplies furnished the separate estate, disencumbered of the other portion of the account, may be recovered. And to that end,

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The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded for a new trial, without prejudice, however, to plaintiff's right to institute proper proceedings to subject the income of defendant's separate estate to the payment of the other portion of the account embracing the articles used by the defendant and her family, should he be advised that the facts of the case may warrant such proceeding.

MR. JUSTICE McIVER concurred.

MR. JUSTICE MCGOWAN *dissenting* (omitting his statement of the case, which has already been given). Some of the exceptions misconceive the charge of the judge, which should be set out at length in the report of the case. As we gather it, the exceptions may be condensed into the allegation of error in charging "that if the wife made the contract, whether in express words or not, if she induced the merchant to sell the articles to her, not as agent of her husband, but in her own right, to be paid for out of her estate, and the credit was clearly given on the faith of her property, then she and her separate estate are liable, as well for the articles purchased for the support of herself and children as for those which she sent directly to her plantation," &c. We must assume that the verdict of the jury, as we think, in accordance with the evidence, established the facts that Mrs. Thomson purchased the goods on her own account, to be paid for out of her separate estate, of which she gave information to the plaintiff, who extended the credit to her on the faith of that property.

It must be confessed that there is some confusion in our law as to the power of a married woman to control her separate property, or charge the same by her engagements; and in the hope of making what we say upon the subject intelligible, we will go back a little. Prior to our present constitution a married woman, as to the right to hold property in her own name as against the marital rights of her husband, was still under the disabilities of the common law. But a system had been built up in the Court of Chancery, on the doctrine of trusts, by which property could be conveyed by deed to one *sui juris*, which deed might at the same time declare in favor of the wife such equitable interests as the donor might desire. This creation of a substantial



interest in the wife, separate from that of her husband, necessarily raised the question as to what control, notwithstanding the marital rights, she should have over that property. In England, after much debate, it was settled that a married woman, as to her separate estate, was a *feme sole*, with the absolute *jus disponendi*, unless the deed restrained her. Most of the American States followed this rule, but our State led the way in adopting precisely the opposite view, viz., that she had no right to contract as to her separate estate, except in so far as it was given by the instrument creating the estate.

Under the operation of this rigid rule it was soon perceived to be impracticable to give the wife the satisfactory enjoyment of her property, without any control over it, even for necessary repairs and the preservation of the property itself; and therefore when there were no express powers given in the deed, the courts were under the necessity of implying certain powers as inherent in the very ownership itself of property. As, for example, in the case of *Clark v. Makenna* (*Cheves Eq.*, 163—as late as 1840), Chancellor David Johnson, with the full concurrence of Chancellors Job Johnston and Harper, said: “If a marriage settlement or other agreement conferring on the wife a separate estate, clothes her with the power of contracting debts and charging her separate estate with their payment, I presume there could be no question about her authority; so that in every case the question is whether the power is expressly or impliedly given. If the question were now open, I should strongly incline to the opinion that it ought to be implied, in all cases, to the extent of the wife’s dominion over the estate—to the *corpus* of the estate, if that was subject to her control, and to the income only, if her powers were limited to that. In the case in hand, the power of contracting debts, and thereby charging her estate with the payment, appears to me to be expressly reserved to the wife in this marriage settlement. \* \* \* Now, the power to contract debts, it is true, is not expressly given, but it is necessarily implied by the covenant that her separate estate should be liable for them,” &c.

Such was the condition of our law as to the perplexing question of the wife’s separate estate in equity, down to 1868, when the constitution was adopted, and soon after the act of 1870,

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which was amended in 1882; so that the written law of the State now is as follows: The Constitution, section 8, article XIV., declares, "The real and personal estate of a woman, held at the time of her marriage. or that she may thereafter acquire either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised, or alienated by her the same as if she were unmarried." And the General Statutes provides: "Section 2037. A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to contract and be contracted with as to her separate property in the same manner as if she were unmarried." These were certainly fundamental changes, and it is quite manifest that they were not intended to abridge, but rather to enlarge the powers of a married woman over her separate estate. Her right to acquire and hold being increased, so was her power of disposal. All the authorities agree that these provisions effected at least two things: first, dispensing with the necessity of a trustee, the separate estate is made legal instead of equitable; and, second, instead of leaving no power to contract, every married woman having a separate estate, now has attached to it the powers to alienate it, and to contract and be contracted with in relation to that separate estate as if she were unmarried.

In the case before us, it does not appear how or when the separate estate of the defendant was created, or what powers, if any, were attached to it. We only know from the defendant's letter to the plaintiff, when she was urging her claims to obtain credit, that she had a handsome estate in York County, which her husband, who, as it seems, has no tangible property of his own, superintended as her agent. In this state of facts we must suppose that Mrs. Thomson had a statutory separate estate, and, therefore, had the legal title and the right to make contracts respecting that property. She did apply to the plaintiff for credit, giving full information as to her property, and the plaintiff, who had refused to credit the husband, extended her credit on the faith of that property. Was that not a contract "as to her separate estate"? It was substantially admitted that the plain-

tiff was entitled to \$168.50 of his account, for the articles such as corn and bacon, which were probably intended for the defendant's plantation, on the ground, as stated, that the contract *quoad* these articles, was in reference to her estate; but it was claimed that as to the other articles of family supplies, &c., the contract was not "in respect to her separate estate." I am unable to see the distinction indicated. The contract was a unity, and how could its character, as to being or not being in reference to her estate, be determined by the use she might make of the articles purchased—half for one purpose and half for another? The fact is, her contract had no necessary connection with the use she was to make of the articles, as to which she might be silent, or deceive the seller. The seeming confusion has, no doubt, grown out of the phrase formerly much used, "for the benefit of the separate estate," which had its origin in the doctrine of the equity of the creditor (when the married woman could not contract at all), which gave to the creditor who had made advances for the benefit of the separate property, reimbursement out of that property. If the express power given to contract as to the separate estate, must be construed as identical with this equity of an advancing creditor, then the new power only increases the confusion and accomplishes nothing whatever.

But if the equity of the advancing creditor were now the only law upon the subject, we incline to think that the plaintiff was entitled to be reimbursed his whole account, including the supplies for the defendant's family, as well as for her plantation. Chancellor Harper, in *Magwood v. Johnson* (1 *Hill Ch.*, 232), states the doctrine thus: "The equity on which a creditor comes into this court to render a trust estate liable to the payment of his debt, is this, that he has advanced his money or given credit to effect the objects of the trust, and having accomplished the objects of the trust at his own expense, he has a right to be put in the place of the *cestui que trust*, or to be reimbursed out of the trust fund." Now, we cannot agree that the only object of a separate estate in a married woman is to perpetuate and preserve itself, even though the owner thereof should not have the means of support. We rather suppose that one of the objects, indeed the main and primary object, is to give the married woman the

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use of it, at least the rents and profits, for the purpose, notwithstanding the misfortunes or improvidence of the husband, of securing to her and her children at all events and under all circumstances a support according to their conditions in life; and, therefore, a creditor who gives such support, comes within the rule as to extending credit to effect the objects of the trust.

It is true that, as a rule, the husband is still bound to support his wife, although her property does not pass to him under his marital rights, as it did when the rule was established. But there are exceptional cases, as where the husband, as in this case, has no property or is unable to support his family. In such case the law neither requires them to starve nor to impose upon their creditors. As was said in the case of *Magwood v. Johnson*, above cited, "A husband, if he be of ability, is bound to support his wife and family, though they may have property of their own. But there may be cases where the husband is not of ability. He may be embarrassed or without property, and the wife may be compelled to support herself out of her separate estate. And she might be subjected to the greatest distress if she could not obtain the means of support on the credit of her separate estate. \* \* \* How far have our courts departed from the English doctrines? Thus far—that the wife should not by her own act merely charge her separate estate [it is different now]. The court will look into the necessity and propriety of the charge. But it still must appear that the credit was given to the wife, and not the husband," &c. The whole doctrine is condensed by Mr. Kelly as follows: "Now, under both rules (English and American) contracts which are necessary and proper to enable a married woman to hold and enjoy her separate estate created by statute, such as contracts for needed improvements or repairs of the separate estate, contracts beneficial to the estate, and in some cases where the benefit enures to herself or the estate, are valid and binding." *Kelly Married Women*, page 268, and authorities.

It seems to me, therefore, that the judgment of the Circuit Court should be affirmed—the judgment to be levied and collected of the separate property of the defendant and not otherwise.

Judgment reversed.

## WALLACE v. CRAIG.

1. Findings of fact by the Circuit Judge from testimony heard by him, approved.
2. In 1874 land was conveyed to C. trustee for L. (a married woman), and her children (L. then having children), with power in the trustee "to sell, dispose of, and convey" on the written request of L. In 1876, money being needed to pay taxes and other expenses on this land, L. borrowed money for the purpose from A., which loan, at her written request, was secured by a mortgage of the land, executed by the trustee to A. Thereafter, at the request of L., who desired longer indulgence and a reduction in the interest, W. purchased this mortgage and afterwards brought action of foreclosure against C., L., and her children. *Held*, that the mortgage was valid as to the interest of L. in the land, which interest was that of a tenant in common with her children living at the date of the deed; but that the interests of the children were not validly mortgaged.

Before COTHRAN, J., Chesterfield, September, 1886.

This was an action by Emily H. Wallace against Laura S. Craig and others. The opinion states the case.

*Mr. H. H. Newton*, for appellants.

*Mr. R. T. Caston*, contra.

November 29, 1887. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. On July 16, 1874, one Sallie P. Craig executed and delivered a deed of certain lands to W. D. Craig, as trustee, "to hold for the sole and separate use, benefit, and behoof of Mrs. Laura S. Craig and her children, all the real estate I now own on the north side of Thompson Creek, &c., to have and to hold all and singular the said premises unto the said W. D. Craig, trustee, as aforesaid, his heirs and assigns and successors; and I do hereby bind myself, my heirs, &c., to warrant, &c. \* \* \* It is further agreed by and between the parties, that upon the written request of the said Laura S. Craig, the said W. D. Craig, trustee, as aforesaid, may sell, dispose of, and convey any part or parcel or the whole of the said tract of land,

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hereby giving him full authority to execute good and sufficient titles thereto and to receive the purchase money and paying the same over to the said Laura S. Craig, or to her order," &c.

In 1876, Laura S. Craig, for the purpose, as she stated, of paying the taxes on the land and other necessary expenses, borrowed one hundred dollars from one W. A. Carrigan, and gave to him her note for the money, bearing interest at the rate of 20 per cent. per annum, with Thomas F. Mulloy as surety. At the same time, in order to obtain the money, she also by written request caused the trustee, W. D. Craig, to execute, as further security to the said Carrigan, a mortgage of a part of the said lands, described as containing 240 acres, more or less. In 1883 the said Laura S. Craig, being pressed for payment, in order to get further indulgence, and to reduce the rate of interest, applied to one J. T. McNair to assist her, giving him written authority to settle the mortgage; and it seems that he was able to induce the plaintiff, Mrs. Wallace, to purchase the mortgage debt, paying to Carrigan the face of the note with interest at 20 per cent. per annum, and agreeing voluntarily to reduce the interest in the future to 10 per cent.

The note was still not paid, and after a year's delay, the plaintiff instituted these proceedings to foreclose the mortgage and to "require the trust estate to repay the money advanced." The children of Laura S. Craig were made parties; as also the administrator of the surety, Thomas F. Mulloy, who, in the mean time, had died. The latter interposed the statute of limitations, and as to him the complaint was discontinued. The trustee, W. D. Craig, and Laura S. Craig answered, admitting that Laura S. did execute the note for the money borrowed, and did direct in writing the trustee to execute the mortgage, which was done; but say "they have been informed and advised, and they now allege, that said deed of trust contains no power authorizing the execution thereof, and that the attempted execution was a nullity," &c. They also allege that the mortgage is void for want of certainty in the description of the premises embraced. The children of the said Laura S. make the same defence, and insist that the title to the lands is in them "free from the attempted mortgage of W. D. Craig, trustee," &c.

The cause came on to be heard by Judge Cothran, who held that there was nothing in the defence as to the alleged want of certainty in the description of the lands. He also held with the plaintiff upon the main question in the case, saying: "Without undertaking to go into the nice learning upon the subject of the execution of powers, or even to follow the learned counsel in their exhaustive and ingenious arguments, it seems to me, that the plaintiff should have the money which is due to her upon the principle that self-preservation is the first law of nature, a principle so broad in its operations and so universally recognized that even trust estates constitute no exception to it. If the power conferred by the deed did not justify the contracting of this debt to preserve the trust estate for the defendants, the court would have ordered it upon proper application for that purpose, and improvident as it may have been in the first instance, as to the rate of interest, this plaintiff is in no wise chargeable therewith, and should not be punished for her generosity and kindness in reducing the rate of interest," &c. He gave a decree of foreclosure, and ordered the land sold for the payment of the debt, and should the proceeds of sale be insufficient to pay off said costs and disbursements and the debt and interest aforesaid, that the plaintiff have judgment for such balance against the said Laura S. Craig and the said William A. Mulloy as administrator as aforesaid (of the surety, Thomas F. Mulloy).

From this decree Mrs. Laura S. Craig and her children, and the trustee, W. D. Craig, appeal to this court upon the following grounds:

"1. Because his honor erred in holding that it appeared from the testimony that as far back as the year 1876, the affairs of the estate were in a desperate condition, and to prevent the sale of the land or a portion of it for taxes, Laura S. Craig negotiated a loan from W. A. Carrigan, which constituted respondent's claim in this case; when, it is respectfully submitted, that there is no proof of this fact.

"2. Because his honor erred in holding that said Laura S. Craig prevailed upon the plaintiff, Mrs. Wallace, to assume the ownership of the claim against her; when, it is respectfully submitted, that there is no proof to sustain this finding of fact.

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"3. Because his honor held in effect that the mortgage given by W. D. Craig, trustee, to W. A. Carrigan was valid—that said trustee had power to execute the same under said deed of trust; and in this, it is respectfully submitted, there was error.

"4. Because his honor erred in holding in effect that the beneficiaries under said trust deed were estopped from denying the validity of said mortgage.

"5. Because his honor erred in holding that the respondent 'should have the money that was due to her on the principle that self-preservation is the first law of nature, a principle so broad in its operation and so universally recognized that even trust estates constitute no exception to it;' when, it is respectfully submitted, that there is no proof to show that the loan from Carrigan to Laura S. Craig was for the preservation of the trust estate.

"6. Because his honor erred in holding that respondent had higher equities for the payment of her claim than her assignor, when, it is respectfully submitted, that she took the assignment of the alleged mortgage debt with all the infirmities that pertained to it in the hands of the assignor.

"7. Because his honor erred in holding that the whole tract of land covered by the alleged mortgage was liable for this debt, when only the interest of Laura S. Craig could, in any event, be subjected to its payment.

"8. Because his honor should have held that the alleged mortgage was invalid because of a lack of power in the trustee to execute the same.

"9. Because his honor should have held that the trust estate was in no way liable for the payment of the note of Laura S. Craig, and should have dismissed the complaint, or have given simple judgment against her upon the said note, and awarded execution thereon."

10. (This exception was abandoned.)

As we understand it, the defence rests mainly on the fact that Mrs. Laura S. Craig was a married woman at the time of the execution of the trust deed to W. D. Craig, trustee, and also of the mortgage to Carrigan, yet no such allegation appears in the pleadings, nor indeed in the evidence except once rather obscurely, where Carrigan in his testimony says: "About 1876,



I was approached by one Mr. Craig, husband of Mrs. Laura S. Craig, for the purpose of borrowing \$125." But as the fact seemed to be assumed on all sides that she was a married woman, we will take it as admitted.

Exception 10 was properly abandoned at the hearing. The complaint had been in effect discontinued as to the administrators of the surety, Mulloy, by the plaintiff's attorney, and thereupon an order was granted dismissing the complaint as to him; and, of course, it was an oversight on the part of the Circuit Judge to embrace him in the decree.

Exceptions 1, 2, and 4, relate merely to matters of fact. We have read the testimony carefully, and we must say that the findings of the judge are not without evidence to support them. Mrs. Craig certainly was in great need of money as shown by her anxiety to obtain it. It seems that her husband (name not given) made application to Carrigan to borrow for her; that she agreed to give 20 per cent., and a mortgage of the tract of land to secure it, and attached to the mortgage the following request in writing: "Mr. W. D. Craig: For the purpose of paying the taxes on my land, and other necessary expenses, I hereby request you to execute this mortgage to W. A. Carrigan. May 20, 1876. (Signed) L. S. Craig." Besides, the clerk of the court, Thomas F. Mulloy, attached his official certificate to the mortgage, that the land covered by it "is not incumbered with judgments, or in any other way whatever; and, further, that the said W. D. Craig has authority, upon the written request of Mrs. Laura S. Craig, to execute any deed or mortgage for a part or the whole of the said real estate. (Signed) Thomas F. Mulloy."

It seems to us, it was satisfactorily shown that Mrs. Craig needed the money for the payment of taxes on the land and other necessary expenses; that in consenting to loan it, the credit was given on the faith of the land and the mortgage thus formally executed; and also that Mrs. Wallace, the plaintiff, was induced by Mrs. Craig (through her friend and agent, McNair) to purchase the mortgage from Carrigan, and to reduce voluntarily the interest by one half—from 20 to 10 per cent.—in kindness to Mrs. Craig, who repeatedly before and after the purchase confirmed the mortgage as her own, and promised payment. But as

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the mortgage purports to have been given by Mrs. Craig under the power in the deed of trust, we will not rest our judgment on the ground indicated, that the money loaned was necessary for the preservation of the trust estate.

All the other exceptions in different forms substantially make the point, that the alleged mortgage, executed by W. D. Craig, at the instance and written request of Laura S. Craig, and now owned by the plaintiff, "was invalid because of a lack of power in the trustee to execute it." The deed of trust from Sallie P. Craig was executed in 1874, after the adoption of the constitution of 1868, and the act of 1870 to carry its provisions into effect; and the mortgage to Carrigan was executed in 1876, before the amendment of 1882, repealing the power, which had been given to a married woman to contract except "as to her separate estate." So that it follows that at the time these transactions took place, the law of this State was well settled, that the power of a married woman over her separate estate was absolute and unqualified.

As Mr. Kelly, in his late work (1882) on the "Contracts of Married Women," at page 516, says in condensed form of the South Carolina law: "As shown in a previous discussion the object of the statute (1870) was to enlarge what was theretofore known as the wife's separate estate, so as to embrace all acquisitions, all classes of property, past and future, that, if she were sole, would vest in her as property, and also to enlarge her power over said property, to the same extent as if she were sole, and at the same time to shield that separate estate from liability to her husband's debts, against her will; and, therefore, under the statute the rule is, that with respect to her separate estate, she is a *feme sole* in every particular." This view of the learned author will be found to be abundantly sustained by the following cases: *Ross v. Linder*, 12 S. C., 592; *Clawson v. Hutchinson*, 11 Id., 326; *Witsell v. Charleston*, 7 Id., 97; *Pelzer, Rodgers & Co. v. Campbell & Co.*, 15 Id., 581; and *Witte v. Wolfe*, 16 Id., 268.

All the authorities agree that the provisions of the constitution or laws which dispense with the necessity of a trustee and declare a statutory separate estate, make the interest legal, instead of

being, as formerly, "equitable." In this case the constitution and laws, which were of force when the transaction took place, certainly made Mrs. Craig's interest in the land mortgaged legal, and gave her the absolute right as a *feme sole* to dispose of it in any way she thought proper. This comes from the fact that the transaction occurred before 1882, when the amendment of the law was passed restricting the right of a married woman to contract, under which some difficult questions have arisen. As the mortgage was executed by Mrs. Craig's written direction, she receiving the consideration which the mortgage was to secure, and for years in various forms and in different ways ratifying and confirming it as her own mortgage, it is precisely as if she, having the powers of a *feme sole* under the law, had executed it herself. See the case of *Stroman v. Varn*, 19 S. C., 307, and authorities there cited.

But it may be said that these parties did not act with reference to the constitution and laws then of force in the State, but chose to proceed by deed of trust, appointing a trustee to hold the legal estate, according to the unwritten doctrine of equity which, as to the separate estate of a married woman, prevailed before the adoption of the constitution, and therefore those doctrines alone should be applied as the standard of their rights. It may be that parties are not precluded from making their own arrangements about their own property. I do not, however, see how that line of conduct upon their part could affect strangers, who dealt with them and are supposed to have acted with reference to the laws then of force. See *Witsell v. Charleston*, *supra*, and *Oliver v. Grimball*, 14 S. C., 565.

But suppose we are mistaken in the view presented, and we must in this case ignore the constitution and laws then of force, and consider the case exclusively with reference to the doctrines of equity which prevailed before the constitution, we think the result in that case would be the same. In this State equity alone had built up a system of rules in reference to the difficult and perplexing question of the powers of a married woman over her separate equitable estate. The lead in departing from the English rule upon the subject was taken by the Chancery Court of South Carolina, which declared that it "was the settled law of

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this State, that where property is given or settled to the separate use of a married woman, she has no power to charge, encumber, or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating the estate, which power must be strictly pursued. This is the reverse of many English cases, which held that she is a *feme sole* with respect to her separate property, and may charge and dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument," &c. But it must not be overlooked that the Equity Courts regarded as established another doctrine, which was clearly stated by Chancellor Wardlaw in *Aaron v. Beck*, 9 Rich. Eq., 415: "The distinction, although nice, is completely established between a gift to one indefinitely, with a general power of appointment superadded, and a gift to one for life, with like power of appointment. In the former case the estate passes absolutely to the donee, and in the latter case an estate for life only passes to the donee, with the power of appointing the inheritance or succession, which must be exercised to be effectual," &c.

Now, applying these rules to this case, how would the matter stand? The deed of trust conveyed the legal estate to the trustee and his heirs "for the sole and separate use, benefit, and behoof of Laura S. Craig and her children. \* \* \* It is further agreed by and between the parties to these presents, that upon the written request of the said Laura S. Craig, the said W. D. Craig, trustee, may sell, dispose of, and convey any part or parcel or the whole of the said tract of land, hereby giving him full authority to execute good and sufficient titles thereto and to receive the purchase money, and paying the same over to the said Laura S. Craig or her order," &c. It is quite clear that the equitable interests declared here were not for life, but were "indefinite" in character; and the only question is, whether the deed of trust gave to Laura S. Craig what is called or was called "a general power of disposal." It seems to us there can be no doubt that such general power was given, and, as a consequence, to the extent of her interest she had the absolute property—the *jus disponendi*, with all its incidents—such as to use, have, charge, mortgage, sell, or devise the same.

In *Reid v. Lamar* (1 Strob. Eq., 27), the words of the settle-

ment were, "to have and to hold the sole discretion and guidance thereof—full and free disposal," which, as will be perceived, were not as full and general as the words here, viz., "sell, dispose of, and convey," with leave to take the purchase money without accountability. It was in that case held, that the power did not authorize Mrs. Jane Reid, the married woman, to make personal contracts, such as ordinary notes; but Chancellor David Johnson said in his Circuit decree: "The deed here confers on the wife the sole direction and the full and free disposal of the property—powers as ample as any owner can exercise over property in which he has an absolute and unqualified right; and it is not questioned that under this power she might have disposed of it by parol or written contract, with or without consideration or by will, or that it would be bound if she had mortgaged it for the payment of these debts," &c.

In *Porcher v. Daniel* (12 Rich. Eq., 353), the same marriage settlement was again before the court upon the very point indicated by Chancellor Johnson in the former case, viz., as to the power of the wife to charge or dispose of the property itself. Mrs. Jane Reid, the married woman, had died in the meantime, during the life of her husband, leaving a will not expressly included in the power by which she disposed of the trust property, and the question was then made, whether the power gave her the right to dispose of the property itself, although the court had previously decided that it did not give her the right to charge it by general personal covenants such as ordinary notes. The court held, notwithstanding the former decision as to the notes, that she had the power to charge or dispose of the property itself. Chancellor Inglis, in delivering the judgment of the court, quoted with approbation the remark of Chancellor David Johnson, that she might dispose of it by will or bind it by a mortgage, hereinbefore referred to, and said: "A married woman, having a separate estate, and having also a general and absolute power of disposition over it, may charge or alien it, or any part of it, or partially or wholly, temporarily or permanently, divest herself of her interest in it, or in any part of it, in any of the modes in which the same kind of property or things may be legally charged or aliened, &c., by one who is *sui juris*, only her intention to do

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this must be clearly manifested," &c. See *Wilson v. Gaines*, 9 *Rich. Eq.*, 421; *Aaron v. Beck*, *Ibid.*, 412; *Pulliam v. Byrd*, 2 *Strob. Eq.*, 142; *Bradly v. Westcott*, 13 *Ves.*, 445.

As Mrs. Jane Reid, under her general power of "sole discretion and guidance," could dispose of the property by will (a mode not expressly indicated in her general power), and could, as Chancellor Inglis as late as 1866 said, "charge or alien it, or any part of it, or partially or wholly, temporarily or permanently, divest herself of her interest in it, or in any part of it, in any of the modes in which the same kind of property or things may be legally charged or aliened, &c., by one who is *sui juris*," I am unable to comprehend why Mrs. Craig, under her general power of disposal, should not have the right to charge the estate, or her interest in it, with a mortgage, even under the equity doctrine which makes the distinction between *property* and mere *power*. Confessedly she had the right to dispose of the land, with or without consideration—to give it away or to sell it and throw the purchase money into the ocean; and, in my judgment, she had the right to execute the mortgage.

Besides, there can be no doubt that a mortgage is within itself a contract—a contract not identical with the debt it is given to secure, but a contract intended to charge certain specified property, and therefore necessarily made *with reference to that property*. See *Gillett v. Powell*, *Speer Eq.*, 143; *Nichols v. Briggs*, 18 *S. C.*, 476; and *Plyler v. Elliott*, 19 *Id.*, 257. "We have seen that a married woman's contracts are binding only when made with respect to her separate estate. Now, her contracts can be so made when they are express or implied charges on the separate estate—express when she expressly charges the estate, such as specific charges, mortgages or lien, and when she by express words charges the contract on the estate" (*Kelly*, 275, and notes). Or, as Mr. Bishop says, "In some States a married woman has not the general power of contract, and so cannot make a valid promissory note, but she can convey her lands. Then if she executes her note and mortgage, though the note is invalid as such, the mortgage to secure it is, as we have already seen, good." 2 *Bish. Married Women*, section 306, and authorities.

But the most difficult question still remains. What quantity of estate did Laura S. Craig, as original donee, take under the deed of trust, without reference to its being legal or equitable? In some respects the deed was inartificially drawn. It is obvious that Sallie P. Craig, the donor, a daughter of Laura S. Craig, intended to convey the land to her mother, Laura S., primarily for her benefit, and incidentally for that of her children; that the mother should take a life estate for the use of herself and children, and at the death of her mother to be transmitted to the latter, of whom she was one. This is shown by making it a "sole and separate estate," which was only necessary to protect the estate of a married woman, and also by the power given to her to dispose of it, and receive the purchase money without accountability. If such intention had been properly expressed, there would have been much less difficulty. But the deed cannot be so construed. The terms are, "for the sole and separate use of Mrs. Laura S. Craig and her children." If the subject had been personalty, these words would have given Mrs. Craig an absolute estate, but it was land; and, although the authorities upon the subject are somewhat conflicting, we suppose that it must fall under the second rule adopted in *Wilds's Case* (6 *Coke*, 16), as follows: "If A devises his lands to B, and his children or issue, and he then have children or issue of his body, then his express intent may take effect according to the rule of the common law, and no certain and manifest intent appears in the will to the contrary, therefore in such case they shall have but a joint estate," &c. See *Reeder v. Spearman*, 6 *Rich. Eq.*, 94; *Shearman v. Angel*, *Bail. Eq.*, 351; and *Johnson v. Johnson*, *McMull. Eq.*, 345; *Feemseter v. Good*, 12 *S. C.*, 573.

Now, assuming that Laura S. Craig was merely a tenant in common with her children, how does that affect her power of disposal, which in terms extends to the whole land? That touches the subject of powers appurtenant and collateral, as to which there are in the books many very refined distinctions. But from the view we take, it will not be necessary to go into the nice and perplexed learning upon the subject. We have already endeavored to show that the general power of disposal given to Mrs. Craig, in addition to the interest originally conveyed to her, had

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the effect of giving her the property in the land, with the absolute right of disposal in any of the ways allowed by law. But as that was only accomplished by the union of the direct gift with the power of disposal, we hold, with some hesitation, that her right to encumber the land must be limited to the interest given to her, which was that of a tenant in common with her children, and to that extent the mortgage is good and enforceable. "A power may, with reference to the different estates in the land over which it rides, have different aspects. It may, in regard to one, be a power appendant; in respect to another, a power in gross. Thus, where an estate is settled to A for life, remainder to B in tail, remainder to A in fee, and A has a power to jointure his wife after his death, this power is collateral or in gross as to the estate for life, but appendant or appurtenant as to the remainder in fee. It may affect the latter, but can never attach on the former." 1 *Sug. Pow.* (Law Library Edit.), \*45.

The judgment of this court is, that the judgment of the Circuit Court, subject to the modifications herein announced, be affirmed.

MR. CHIEF JUSTICE SIMPSON and MR. JUSTICE McIVER. While we do not assent to many of the views advanced in this opinion, we concur in the result.

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GWYNN v. GWYNN.

1. The constitution of this State (art. XIV., § 8) does not confer upon a married woman, either expressly or impliedly, any general power to contract, but simply implies the power to make such contracts as are necessarily incident to the exercise of those powers that are conferred.  
*Cases reviewed.*
2. The provision of the statute (*Gen. Stat.*, § 2036), that "all deeds, mortgages, and legal instruments of whatever kind shall be executed by her [a married woman] in the same manner and have the same legal force and effect as if she were unmarried," confers no independent power to contract, but only prescribes the manner in which she shall exercise such powers as are elsewhere conferred upon her, and their extent.
3. While a married woman had, under the act of 1870, a general and unlimited power to contract, the amendment of 1882 (*Gen. Stat.*,



§ 2037) limited her power to contract at all, except "as to her separate property."

4. Therefore, under this law, a married woman could not enter into a contract of partnership with her husband or other person; for such a relation involves an obligation to contribute one's time and services, which a married woman has no right to control, and a personal liability for debts which she has no power to incur, as such debts would arise from partnership contracts which she has no power to make, they not being contracts as to her separate property.
5. This question being one of power and not of intention, no acts or representations made by the married woman, in the absence of fraud, would operate as an estoppel against her.
6. This case distinguished from *McLure v. Lancaster*, 24 S. C., 273.
7. May a married woman, by virtue of the absolute dominion over her separate property with which she has been invested by the constitution, sell such property and apply the proceeds to the payment of her husband's debts?
8. A deed of assignment is not an absolute conveyance, but a conveyance in trust for the purposes therein declared, and where the objects of the trust fail, the title reverts to the assignor. A man and wife having signed articles of partnership, and afterwards executed a deed of assignment appropriating partnership assets to partnership debts, and separate property to individual debts, the assignment must stand only so far as it appropriated the so-called partnership assets (which were really the property of the husband) and the husband's individual property to his individual debts (including those of the so-called firm), and so far as it appropriated the wife's separate property to the payment of her legal obligations, which did not include the debts contracted by her husband in the firm name.
9. Recognition by the wife of the partnership and of her liability for its debts, declared in the deed of assignment, did not make valid a contract of partnership that she had no power to enter into, nor impose liabilities growing out of such illegal contract.

MR. JUSTICE MCGOWAN, *dissenting*.

Before FRASER, J., Spartanburg, October, 1886.

The appeal was from the following decree :

Under section 2037, Gen. Stat., a married woman "may purchase any species of property in her own name \* \* \* in the same manner as if she was unmarried." An unmarried woman may, under this law, purchase an interest in common, a joint interest, an interest in possession, remainder, or reversion. Why may not a married woman, under the terms of this act, do

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the same? Why may not a wife who can purchase as if unmarried, purchase jointly with her husband as well as his unmarried sister may do? *Stew. Husb. & Wife*, § 303, notes. The right to purchase gives the right to purchase on a credit. *Ibid.*, § 223, note 6, citing authorities. She may purchase through an agent. *Ibid.*, note 28, citing authorities. I see no reason why the husband may not be that agent, and such an agent as is implied in all partnership.

I am of the opinion that a contract, express or implied, to pay a sum of money *in consideration* of the purchase of property by the person who makes the contract, is a contract in reference to that property so purchased and transferred, and that such property—a horse, a tract of land, a stock of goods, or a joint interest in a stock of goods—purchased by a married woman, is “her separate estate” in the sense used in the act. In the case of *Witsell v. Charleston* (7 S. C., 100), it is said that the object of our statute (and in this respect the General Statutes of 1882 makes no change) was “to enlarge what was heretofore known as the wife’s separate estate so as to embrace *all her acquisitions*, past or future, of such a nature that if she were a *feme sole*, they would vest in her as property.”

It would be fair to infer that the words “in reference to her separate estate” were incorporated in section 2037, and used in this sense, and intended to cover all the property which an unmarried and therefore a married woman might hold, including interest held in common or jointly with others. In the case of *Haas v. Shaw* (91 Ind., 384), it was held that under the statute of that State a married woman could not bind herself as a partner of a firm composed of her husband and herself. That statute differs from ours in several very important particulars. She cannot mortgage her property to pay her husband’s debts. Her “sole and separate estate” seems to refer to property with which the husband must have no connection whatever, while under our act it seems to include all her estate of every kind which she could have held if unmarried. I am satisfied it is a fair construction of the Indiana statute to hold that a married woman cannot enter into a copartnership with her husband, so as to make herself liable for the debts.

In *Clinkscales v. Hall* (15 S. C., 602), it was held that a mar-

ried woman, under the law as it then stood, might become surety for her husband, and there is nothing in words added by the amendment of 1882 in reference to her separate estate, which can in any way affect the question of her joint liability with him, raised in this case. If they can be jointly liable, they ought to be able to hold jointly. I conclude, therefore, that plaintiff did make a contract or contracts to pay their partnership debts, and that her interest in the firm was so intermingled with that of the defendant upon the successful management of the business of the firm, that the whole of the debts may be fairly said to have been made in reference to her "separate estate."

It may be admitted that this is not the correct conclusion, and that upon full consideration it may be held that she was not in law bound to pay the debts of the firm. Yet the assignment may be good. She had an unquestioned right to convey her estate to whom and for what purpose she pleased, with or without consideration, if done freely and voluntarily. If she was liable for these copartnership debts, then the deed is founded on a valuable consideration, and she has no right to complain. If she was not liable for them, and had a full knowledge of the facts, and executed the deed in consequence of a mistake, in ignorance of the law in reference to her liability, will that be sufficient to justify the court in setting aside the deed of assignment as void in consequence of this mistake in ignorance of law?

The rule in principle suggested by Mr. Pomeroy in § 849 of his great work on Equity Jurisprudence, as the proper one to be applied in cases of mistakes of law, does not seem to be fully supported by the authorities. See note 1, to § 849. In *Cunningham v. Cunningham* (20 S. C., 317), our Supreme Court holds that a mistake in the construction of a will was not sufficient ground on which to set aside a deed of conveyance made in consequence of that mistake—basing its conclusion on an opinion in one of our own cases as to the insufficiency of a mistake in the construction of a deed to authorize the court to set aside a conveyance. There is no good reason why any different rule should be applied where a person, instead of misconstruing a deed or a will, misconstrues a statute, which all persons, for the very peace of

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society and stability of personal and property rights, must be presumed to know.

In the case before the court there was no fraud, no intentional misrepresentation, and all parties concerned, trustee, plaintiff and her husband, acted under the common impression that the married woman was liable for their contracts. It does not appear that she ever inquired, or ever was told, whether or not she was liable. If there was any error on this point, it was mere ignorance of law upon which these creditors themselves acted when they sold their goods to the firm of Gwynn & Co. If the court does grant the relief the plaintiff demands in this case in consequence of her mistake of law, it has no means of giving these creditors any relief for their mistake of law, in consequence of which these goods have been delivered to the plaintiff and her husband, and either used, mismanaged, or wasted by them.

In support of the view here taken as to the misconstruction of her liability under the statute by a married woman, I refer to *Herron v. Herron* (91 Ind., 278), in which it was held that a mortgage given by a married woman to secure her husband's debts, could not be set aside because it was executed in consequence of the fact "that she was ignorant of the law and misinformed as to her legal rights." For these reasons I am not able to concur with the conclusions of the referee, conscious that the questions raised are new and interesting ones, about which there will necessarily be difference of opinions.

It is therefore ordered and adjudged, that the report be overruled and the complaint dismissed with costs.

Plaintiff appealed upon the following exceptions :

1. Because his honor erred as matter of law in reversing the report of the referee, David Johnson, Esq., and in holding that by the laws of South Carolina a married woman can lawfully enter into a contract of partnership with her husband.

2. Because his honor erred in reversing the judgment of the said referee that the deed purporting to be "a deed of assignment from A. J. Gwynn, M. L. Gwynn, and Gwynn & Co., to the defendants, C. P. Sanders, is inoperative, null, and void in so far as it affects the property of the plaintiff, Marie L. Gwynn."

3. Because his honor erred in not holding that if there were

no partnership, and therefore neither partnership property nor partnership assets nor partnership debts, that there was nothing which could uphold the deed as an assignment for purposes which did not in fact *exist*.

4. Because his honor erred in not adjudging (upon the facts as proved) that the plaintiff, Marie L. Gwynn, was not estopped, either by her conduct or by her deed, from asking the relief demanded in her complaint.

5. Because his honor erred in supposing that the mistake of the plaintiff (which mistake was not absolutely essential to the plaintiff's case) was a mistake of law, instead of being what it really was, a mistake of fact.

6. Because his honor erred in overlooking entirely in his decree, and not giving due weight to the position and condition of the said Marie L. Gwynn at the time of the execution of the said deed, and the representations that were made to her at and before the execution thereof.

*Messrs. Pope & Shand*, for appellant.

*Mr. J. S. R. Thomson*, contra.

November 29, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. On August 18, 1884, the plaintiff and the defendant, A. J. Gwynn, then and yet being man and wife, with a view to the formation of a commercial partnership, signed a paper, of which the following is a copy :

“SPARTANBURG, S. C., Aug. 18, 1884.

“We, the undersigned, have this day formed a copartnership for the purpose of carrying on a general dry goods business under the style and firm of Gwynn & Co. A. J. Gwynn, of the undersigned, is hereby authorized to have entire management of said business, and to make all contracts, endorsements, &c.

“(Signed)

M. L. GWYNN,

“A. J. GWYNN.”

The business was carried on for a short time under the name of Gwynn & Co., but very soon proved so unsuccessful that it was deemed necessary to make an assignment for the benefit of

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the creditors. Accordingly on March 3, 1885, a deed of assignment was executed by A. J. Gwynn and M. L. Gwynn (the same being also signed in the partnership name, Gwynn & Co.), whereby all the partnership assets, as well as the individual property of A. J. Gwynn, and the separate property of the plaintiff, were conveyed to the defendant, Sanders, in trust, that he should sell the same, and after paying all the expenses incident to the assignment, that the proceeds be applied to the payment of the partnership debts, and the individual debts of said A. J. Gwynn and M. L. Gwynn, so that the individual assets should be first applied to individual indebtedness and the residue thereof, together with the partnership assets, to such of the partnership debts as the holders thereof would receive in full discharge of their claims.

The assignee having accepted the trusts and entered upon the duty of carrying them out as declared by the deed of assignment, this action was commenced for the purpose of having the alleged partnership declared illegal, and not binding on the plaintiff, and for having the deed of assignment set aside, and cancelled, and for the purpose of procuring from the defendant, Sanders, an accounting for all the separate property of the plaintiff which went into his hands under the deed of assignment. The issues of law and fact were referred to a referee, who made his report, finding as matter of law that the agreement between the plaintiff and A. J. Gwynn, purporting to be a contract of partnership, was illegal and void, upon the ground that the plaintiff, being a married woman, had no power to make such a contract; and that the deed of assignment, so far as it purports to affect the separate property of the plaintiff, was likewise void.

Upon exceptions to this report, the Circuit Judge held that the contract of partnership was valid and binding upon the plaintiff; but that even if this be not so, still the deed of assignment was good and valid. And he therefore rendered judgment that the report of the referee be overruled, and that the complaint be dismissed. From this judgment the plaintiff appeals upon the several grounds set out in the record, whereby two general questions are presented for the consideration of this court: 1st. Whether the alleged contract of partnership is such a contract as

the plaintiff had the capacity to make. 2d. Whether the deed of assignment, in so far as it purports to affect the separate property of the plaintiff, is valid and binding upon the plaintiff.

The first question involves an inquiry into the limitations upon the *power* of a married woman to make a contract, though, perhaps, it would be more accurate to say that it involves an inquiry into the extent to which a married woman has been invested with the power to contract. It is universally conceded that, at common law, she had no such power at all, and therefore any that she may now have must be derived solely from some constitutional provision or some statute. The only constitutional provision which we have upon the subject is that contained in section 8, art. XIV., of the Constitution of 1868, which reads as follows: "The real and personal property of a woman, held at the time of her marriage, or that she may thereafter acquire, either by gift, grant, inheritance, devise, or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised, or alienated by her the same as if she were unmarried: Provided, that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors."

Now, it is quite clear that this provision does not, *in express terms*, confer upon a married woman the power to make any contract at all; and the most that can be said is, that, *by implication*, it confers the power to make such contracts as are necessarily incident to the exercise of the powers expressly granted. For example, the power to alienate being conferred, this, by implication, carried with it the power to make a contract for the sale of her separate property. So the power to acquire property by grant or otherwise being recognized, the power to make a contract for the purchase of property would seem to be a necessary incident to such a power. But this is as far as the constitutional provision goes. It confers no general power to contract, either expressly or impliedly, but simply *implies* the power to make *such* contracts as are necessarily incident to the exercise of those powers which are conferred. This is so conclusively shown by the Chief Justice in the opinion prepared by him in the case of *Aultman & Taylor Company v. Rush* (26 S. C., 517), that it

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can scarcely be necessary to add anything to what is there so well said. But as a different view seems to be entertained by some whose opinions are entitled to the highest consideration, it may not be amiss to consider the subject further.

It is a mistake to suppose that the case of *Pelzer v. Campbell* (15 S. C., 581), determined that the provisions of the constitution were broad enough to confer upon a married woman the general power to contract. On the contrary, the great question there was whether it was competent for the legislature to confer upon married women powers which had *not* been conferred by the constitution, and the court held that it was—that the provision of the constitution above quoted was not exhaustive of the subject, and that the legislature might confer additional powers upon a married woman to those mentioned in the constitution; and hence that the act of 1870, conferring upon a married woman the power to contract generally, was not unconstitutional. One of the reasons given for such a conclusion in that case was stated in the following language: “Based on the law, as it then stood, the main object of the provision in the constitution seems to have been, not so much to declare the rights of *the wife*, as to negative those of *the husband* in regard to her property, not to *enable her*, but to *disable him and his creditors*, and, therefore, no exhaustive catalogue of all her powers was intended to be given, but only a mention, in general terms, of such of them as were incident to the main purpose of excluding the rights of the husband.” This language is followed by a quotation from the case of *Townsend v. Brown* (16 S. C., 91), in which, speaking of this provision of the constitution, the following language occurs: “The real purpose there does not appear to have been to confer any new powers upon a married woman by changing her legal status, but simply to protect her property from liability for her husband’s debts, and to release it even from the partial control of the husband by dispensing with the necessity which had previously existed of obtaining his consent and concurrence before her property could be disposed of.”

In view of the construction thus authoritatively placed upon the provisions of the constitution, we do not see how it can now be contended that the constitution confers upon a married woman



the power to make any contract except such as is necessarily incident to the powers therein expressly granted. But again, as we are told by that eminent author, Judge Cooley: "Constitutions are to be construed in the light of the common law, and of the fact that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common law rules, but only that for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well-understood system, which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." Let us examine the constitutional provision which is here under consideration in the light of this principle.

At common law, as we have said, the civil existence of the wife being merged in that of her husband, her right to hold property separate from him was not recognized and she had no power to make any contract at all; but Courts of Equity did, for some purposes, recognize the individuality of the wife, as distinct from and independent of the husband, and especially did it recognize the right of the wife to possess and enjoy property separate from, and independent of, the control of her husband; and did recognize the power of the wife to exercise over such property all the powers authorized by the instrument creating such separate estate. But, however it may have been in England or elsewhere, it was the settled law of this State, "that where property is given or settled to the separate use of a married woman, she has no power to charge, encumber, or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating her estate, which power must be strictly pursued." *Reid v. Lamar*, 1 *Strob. Eq.*, 27. Accordingly, in that case, where, by an informal antenuptial marriage settlement, it was agreed that the wife should, through the intervention of a person designated as her agent, have "the full and free disposal" of all her property, together with "the sole direction and guidance thereof,"

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it was held that the separate property of the wife was not liable for certain notes executed by her, together with her husband, some of which were for debts contracted on her account, upon the ground that the instrument creating the separate estate did not invest her with power to charge her estate in that way. But, on the other hand, where, as in *Clark v. Makenna* (*Cheves Eq.*, 163), the instrument creating the separate estate of the wife makes it "liable for her own debts and contracts," she may charge her estate by note or other contract, and her separate estate can be subjected to the payment of debts thus contracted.

This being the state of the law at the time of the adoption of the constitution, how are its provisions to be construed in the light of the previous well settled law? Is it not manifest that the constitution did nothing more than to declare *all* the property of a married woman to be "her separate property," as well that which she may have at the time of the marriage, as that which she may subsequently acquire, thus superseding the necessity for creating a separate estate in each particular case, by deed or will, and to invest her with power to dispose of the same either by bequest, devise, or alienation? It did not create any *new* estate, not previously known to the law, but simply declared that upon every marriage the wife's property should be held as her separate estate—an estate which was previously well recognized with all its incidents, but which, prior to the constitution, could only have been created by deed or will.

This being so, in considering the effect of the provisions of the constitution in any particular case, they should be construed just as if the same provisions were inserted in a deed, creating a separate estate in a married woman. Now, if the language used in the constitution had been incorporated in a marriage settlement, or other deed of trust, or in a will, it could not for a moment be contended that the wife was invested with any other powers than those specified in such deed or will; and if, as in *Reid v. Lamar*, *supra*, the power of "full and free disposal," of her property, together with the power to have "the sole direction and guidance thereof," did not confer upon the wife the power to bind her estate by contract, evidenced by a note executed by her, much less would the power to bequeath, devise, or alienate her separate

property, carry with it the power to bind her separate estate by contract.

It seems to us, therefore, that it is beyond dispute that the constitution confers no power upon a married woman to make any contract, except such as is necessarily incident to the powers expressly granted; and beyond all question the power to enter into a contract of partnership is not incident to any power granted by the constitution.

Our next inquiry is whether there is any statute by which a wife is invested with the power to enter into such a contract of partnership as is here in question; for a married woman confessedly having no such power at common law, and none such having been conferred by the constitution, it follows necessarily that those who claim the existence of such power must point out the statute by which it has been conferred. The only statutory provisions which we have upon the subject, applicable to the case now in hand, will be found in sections 2035, 2036, and 2037 of the General Statutes. The first of these sections being nothing more than a substantial repetition of the provisions of the constitution, need not be further noticed. Section 2036 reads as follows: "A married woman shall have power to bequeath, devise, or convey her separate property in the same manner, and to the same extent, as if she were unmarried; and, dying intestate, her property shall descend in the same manner as the law provides for the descent of the property of husbands; and all deeds, mortgages, and legal instruments of whatever kind shall be executed by her in the same manner, and have the same legal force and effect, as if she were unmarried."

Section 2037 is in the following language: "A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to contract and be contracted with as to her separate property in the same manner as if she were unmarried: provided, that the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for her necessary support."

These sections were taken from the act of 1870 (14 *Stat.*, 325), but when they were incorporated in the General Statutes of 1882 a very important amendment was inserted in section 2037,

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whereby the general power to contract, conferred by the act of 1870, was limited so that a married woman could only contract and be contracted with "*as to her separate property*"—the words italicized having been inserted as an amendment to the previous act, and one of the main inquiries in this case is as to the construction and effect of that amendment.

It may be, and has been, said that the language found in section 2036, declaring that "all deeds, mortgages, and legal instruments of whatever kind shall be executed by her in the same manner and have the same legal force and effect as if she were unmarried," confers upon a married woman the same general power to contract as is possessed by a *feme sole*; but, as is conclusively shown by the Chief Justice, in the case of *Aultman v. Rush*, hereinbefore referred to, this cannot be regarded as the effect of that language. To give it such an effect would be wholly to ignore the amendment of 1882, and would be in direct conflict with the decision of this court in *Habenicht v. Rawls* (24 S. C., 461), where it was held that a married woman was not liable on a note executed by her, as surety for another, since 1882; for certainly a note is a "legal instrument." It is quite clear that the language relied on only prescribes *the manner* in which such powers as are otherwise conferred upon a married woman shall be exercised.

To determine the scope and effect of the amendment of 1882, it is important to bear in mind that prior to its adoption the act of 1870 had conferred upon a married woman general power "to contract and be contracted with in the same manner as if she were unmarried," and that, while there could be no dispute as to the effect of that language, there was serious controversy as to whether the legislature could, constitutionally, confer such unlimited power upon a married woman, which controversy was determined by the decision of this court in the case of *Pelzer v. Campbell*, *supra*, holding that the act of 1870 was constitutional. That decision was filed on November 16, 1881, and at the very next session of the legislature, held only a few days afterwards, the amendment under consideration was adopted and inserted in section 2037, as hereinbefore set out. This conclusively shows that the law making power was not satisfied that the law should

any longer remain as it was declared to be by the act of 1870, and, therefore, determined to make, and did make, a change in the law.

What was that change, and what was its purpose? As we have seen, under the previous law, the wife had general, unlimited power to contract; so much so as to enable her to bind her separate property for the payment of a note signed by her as surety for another. The change determined on was, manifestly, not for the purpose simply of avoiding that particular evil; for if that had been the object, it might have been effected by the insertion of a proviso to that effect, as has been done by some of our sister States. On the contrary, the change was broader and more radical. It was not confined simply to such a limitation of the general power to contract, as would forbid a married woman from contracting as surety for another—the particular kind of contract which, no doubt, prompted the desire for a change of the law—but it was such a limitation as would forbid her from making any contract, except a contract “as to her separate property.” Its manifest purpose was to protect the wife by limiting her power to contract. The legislature, doubtless, had in view the object which the Court of Equity had in recognizing the separate estate of married women, which, as Chancellor Harper said, was to protect them “against the influence or practices of their husbands, which might be exercised without the possibility of detection; as also to guard them against their own generous or devoted impulses.”

This could only be effected by depriving her of the *power* to contract, for if left to her own will, experience conclusively shows that a devoted and confiding wife could be very easily induced to sacrifice her all in, perhaps, what every one else would regard as a desperate attempt to shield a reckless or improvident husband from financial distress, and thus the law which was designed to afford her protection would be found totally inefficient to that end. If the purpose of the amendment was not to protect the wife, why should her *power* to contract, any more than that of a person *sui juris*, be limited at all? We are unable to conceive of any other reason. Hence, in considering the validity of a contract entered into by a married woman, the question is not as

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to her *intention*; for if that were so, then the whole purpose of the amendment—the protection of the wife not only against the importunities, or perhaps the harsher influences of the husband, but also against her own generous and devoted impulses—would be defeated, but the sole question is whether the contract in question is of such a character as she has the *power* to make. But, it may be asked, if this be so, why then did not the legislature deprive a married woman of the power to make any contract at all, thus affording her complete protection? The answer is obvious. The constitution having, by necessary implication at least, conferred upon a married woman the power to make a contract for the acquisition or disposal of her separate property, the legislature could not, of course, deprive her of such a power; but they could, and did, restrict the general power to contract previously conferred by the act of 1870, to a power to contract only “as to her separate property,” following in the line of the constitution.

It may be said, if this be so, then the act goes no further than the constitution, and was, therefore, totally unnecessary. To this there are several answers. In the first place, section 2035, as we have said, is nothing but a repetition of the first part of the section of the constitution, very nearly *in totidem verbis*, and the slight change in the phraseology does not affect the meaning, and yet the legislature saw fit to re-enact this portion of the constitutional provision. In the next place, it will be observed that the word “contract” is not to be found in the constitutional provision, and hence the legislature might have deemed it advisable to confer, in express terms, a power which could only be implied from the provisions of the constitution. In the third place, and this we think is the proper view of the matter, the legislature finding that the constitution did not, in express terms, confer upon a married woman the power to contract and be contracted with, though such a power might be necessarily implied in the power to acquire and dispose of her property, and fearing that it might be doubtful whether the further power to make such contracts as would be necessary or desirable for the proper use, custody, preservation, and enjoyment of the wife's property, could also be implied from the general terms used in the constitution, made this enactment

for the purpose of removing such doubt by declaring, in express terms, that a married woman might "contract and be contracted with, as to her separate property, in the same manner as if she were unmarried."

This being the nature of the limited power of a married woman to make contracts, and the purpose of the limitation being to protect her not only from the importunities of her husband, but also from her own improvidence and weakness in yielding to her own generous and self-sacrificing impulses, we are now prepared to consider the first question presented in this particular case—whether the plaintiff had the power to make the contract of partnership set up in this case. It will be observed that the alleged contract, a copy of which is set out above, is expressed in the most general terms. It contains no provision that either of the proposed parties shall put in, as capital, any specified amount of money, or any particular property. It is simply a bald agreement between husband and wife for the formation of a general partnership, in which no particular terms are specified, and no provision that either or both of the proposed partners are to furnish the whole or any part of the capital. Now, we are told by Chancellor Kent (3 *Com.*, 2) that a "partnership is a contract of two or more persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." And in 1 *Parsons on Contracts*, 147, it is said: "A partnership exists when two or more persons combine their property, labor, and skill, or one or more of them, in the transaction of business for their common profit."

Now, inasmuch as there is no mention made of any money, effects, or property in this agreement, if we should regard this as an agreement that each of the parties named should combine their labor and skill in the proposed enterprise, it is quite certain that no such partnership could be formed between husband and wife, for the simple reason that her labor and skill already belong to her husband. As we have determined in the recent case of *Bridger v. Howell* (*ante*, 425), neither the constitution nor the statutes have made any change in the doctrine of the common law that the husband is entitled to the personal earnings of the wife,

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because her services belong to him and not to her. But if, on the other hand, the alleged contract of partnership could be regarded as an agreement on the part of the wife to put her separate property into the partnership as a part of its capital, the very moment it was so put in, it would at once cease to be her *separate* property and would become the property of the partnership, and hence any contract subsequently made by the alleged partnership could not be regarded as a contract made by the wife "as to her separate property"—the only kind of contract which she has the capacity to make—and she could not, therefore, be bound thereby. A married woman being thus denied the capacity to assume one of the liabilities necessarily incident to the partnership relation, it would seem to follow necessarily that she has no power to form such a relation.

But even if it should be assumed that an agreement by a married woman to put her separate property into a partnership as a part of its capital, was a contract as to her separate property, it would be quite sufficient, for the decision of this particular case, to say that the contract here set up contains no such stipulation or provision. We are not, however, disposed to rest our decision upon that narrow ground. Even conceding that an agreement by a married woman to contribute her separate property to the capital of a partnership, *if that was all of the agreement*, would be such a contract as she was competent to make, would not conclude the inquiry, for that is *not* all that is involved in the contract of partnership. It most usually involves an obligation to contribute one's time and services, which a married woman has no right to control, and, what is much more important, it involves a personal liability for the debts of the partnership, which a married woman has no power to incur, as such debts arise from contracts, which can in no sense be regarded as contracts as to her separate property. It seems to us clear, therefore, that, even looking to the property relations between husband and wife, a contract of partnership is not such a contract as a married woman has been invested with the power to make; but when we look to the more important and sacred relations between man and wife, which lie at the very foundations of civilized society, which are liable to be at least disturbed, if not absolutely destroyed, by



allowing the wife to enter into partnership with any one, with whom she may see fit to form such a relation, we cannot suppose that the legislature ever intended to invest her with such a power. They certainly have not said so in express terms, and we do not think that such a power can be implied from what they have said.

If, then, the plaintiff had no power to enter into the alleged contract of partnership, it follows necessarily that there could be no partnership debts, and that neither the plaintiff personally nor her separate property can be held liable for the so-called partnership debts. It does not seem to us that there is any room for any estoppel. As we have seen, the question is one of *power*, not of *intention*, and in the absence of any allegation and proof of fraud, we do not see how any representations, either by word or act, could affect the inquiry. There was, no doubt, an honest mistake on the part of all parties concerned. The creditors all knew or had a very ready means of ascertaining that the plaintiff was a married woman. There was no pretence of any concealment or misrepresentation as to that. Indeed, we think the evidence shows that the creditors knew that they were dealing with a partnership, so-called, which purported to be composed of husband and wife, and the mistake which they, as well as the plaintiff, made was in supposing that the plaintiff had the capacity to enter into such a contract. If the plaintiff had no *power*, even by an agreement in express terms, to bind herself or her separate property for the payment of the so called partnership debts, certainly no acts or representations made by her, in the absence of actual fraud, could have the effect of estopping her from denying a liability which she had no power to incur.

The case of *McLure v. Lancaster* (24 S. C., 273), which seems to be much relied on by counsel for respondent, as showing that it was competent for the wife to enter into any business transactions with her husband, and hence that she might enter into partnership, differs very materially from the present case, and is very far from warranting any such conclusion. In that case the wife had conveyed her separate property to her husband, reserving to herself the use and enjoyment of the rents and profits during her life, the property to revert to her in case she survived her

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husband. Upon the death of the husband, leaving the wife surviving, she brought the action against his executors to recover the rents and profits received by him during his life, and the jury were instructed, properly, as it was held, that the real question was, whether the wife had permitted the husband to receive the rents and profits and dispose of the same as he pleased; for if so, then a gift of the rents and profits from the wife to the husband might be implied. This necessarily resulted from the power conferred upon a married woman by the constitution to dispose of her separate property, which, of course, would include the rents and profits thereof, and that having the power, by express gift, to transfer the rents and profits to the husband, such a gift could very well be implied from her long acquiescence in the receipt and uncontrolled disposal of them by the husband. The language used by the Chief Justice, in delivering the opinion, shows conclusively that this right of the wife to make contracts with her husband, or as it is there expressed, enter into "business transactions" with him, was confined to contracts or transactions with reference to the wife's *separate property*, and did not extend to contracts or transactions generally, for after stating the ruling of the Circuit Judge, the Chief Justice said (*italics ours*): "When the judge *confined* such transactions to *the property* of the wife, it cannot be said that he went too far."

If, then, the plaintiff was not liable for the so-called partnership debts, the only remaining inquiry is, whether the deed of assignment, in so far as it affected the separate property of the plaintiff, was valid and binding. Even conceding that, by virtue of the absolute dominion over her separate property with which a married woman has been invested by the constitution, she might sell such property and apply the proceeds to the payment of the debts of her husband, although the manifest object of the constitutional provision was to protect her property against such debts, yet the question would still remain, whether this deed of assignment was a valid appropriation of the property of the plaintiff to the payment of her husband's debts. A deed of assignment is not an absolute conveyance, but it is a conveyance *in trust* for the purposes therein declared, and if the object of the trust fails,

there is no valid conveyance of the property embraced in the deed, or at least the title reverts to the grantor.

In *Hill on Trustees*, 342, we are told, upon the authority of the cases there cited, that "in expounding trusts, though created by deed, the intention of the parties is to be pursued, as much as in cases of wills." We must therefore inquire what was the intention of the plaintiff in executing the deed of assignment, as derived from its terms. It certainly was *not* her intention to appropriate her separate property, or any part thereof, to the payment of her husband's debts, as appears clearly from the terms of the deed. It appears from the several schedules attached to, and forming a part of, the deed, that the plaintiff had separate property and was owing individual debts; that her husband also had individual property and was owing individual debts; and that there were debts as well as assets of the so-called partnership under the name and style of Gwynn & Co.

This being the condition of things, the next inquiry is, what were the purposes of the deed—what were the intentions of the parties as disclosed by its terms? The deed, after stating the contracting parties, commences with a recital that the parties of the first part, the plaintiff and her husband, are indebted to divers persons, and being then unable to pay the same in full, and being desirous to provide for the payment of the same by an assignment of all their property, then proceeds to convey the same to the defendant, Sanders, in trust for the purposes therein declared, which in brief are as follows: 1st. That the individual property of each shall be applied to the payment of their individual debts, and any surplus that may remain after such application shall be applied to the payment of "all the creditors of the said A. J. Gwynn and M. L. Gwynn as partners." 2nd. That the partnership assets shall be applied to the payment of the partnership debts.

These purposes, as thus disclosed by the terms of the deed, show clearly that it was the intention of the parties that the separate property of the plaintiff should be applied first to the payment of her own individual debts, and next to the payment of such creditors of the supposed partnership, as should be able to establish their demands before him, and that no part of her sep-

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arate property was to be applied to the individual debts of her husband. Now, if, as we have seen, there was no partnership, there could, of course, be no copartnership creditors, and therefore so much of the deed as purported to appropriate the separate property of the plaintiff to the payment of debts of Gwynn & Co., which must be regarded as nothing more than the individual debts of A. J. Gwynn, contracted by him under the name and style of Gwynn & Co., could not take effect by reason of the non-existence of the declared object of such appropriation.

The fact that the plaintiff has, by the terms of the deed of assignment, recognized the existence of the partnership and her liability as partner, cannot affect the question. For, as we have seen, the question is one of *power*, and not of *intention*; and if she had no power to enter into the contract of partnership by an express agreement to that effect, certainly her subsequent recognition of it could not make it valid. So, too, not having the power to make any contract except as to her separate property, she could not, even by express admission, assume liability for a debt contracted by her husband in the name of a partnership of which she was erroneously supposed to be a member, as that was not such a contract as she was authorized to make.

It seems to us, therefore, that the deed of assignment, in so far as it purports to appropriate any portion of the separate property of the plaintiff to the payment of any debts contracted by her husband under the name of Gwynn & Co., should have been adjudged a nullity and not binding on the plaintiff; but that it may stand in so far as it purports to appropriate her property to the payment of such individual debts as may be shown to be legally due by her, as well as in so far as it appropriates the individual property of A. J. Gwynn to the payment of his individual debts.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

MR. CHIEF JUSTICE SIMPSON concurred.

MR. JUSTICE MCGOWAN, *dissenting*. I cannot concur in this

opinion so far as it relates to the partnership debts, and the assignment of Mrs. Gwynn to pay them. With great respect for the opinion of my brethren, I find it impossible to agree with the construction given to the married woman's provision in the constitution, and to the act of 1870 as amended in 1882, giving to a married woman the power to contract as to her separate estate. The provision of the constitution is in these words: "The real and personal property of a woman, held at the time of her marriage, or that she may thereafter acquire, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and *may be bequeathed, devised, or alienated, the same as if she were unmarried,*" &c. In construing this provision, it is insisted that the word "alienated" does not, either expressly or impliedly, confer upon a married woman any power of disposition over her separate estate, except to make "a simple sale of it" out and out; for the reason, as claimed, that the provision must be construed in the light of the common law, which denied to a married woman any power to contract or dispose of her property. As it seems to me, such a construction is unauthorized for the following, among other, reasons, stated in simple propositions:

First. The very nature of the instrument in which the provision appears, as it seems to me, excludes such construction. It is a formal provision in the constitution, embodying the fundamental law, which, as is very apparent, essayed to make very radical changes upon the very subject of the status of a married woman concerning her separate property. The common law may be repealed by a simple act of the legislature, not to say by the constitution, the fundamental law. If it were otherwise, the old common law could never be changed at all, which is certainly not the case. If it had not been the intention to alter the common law, why was the provision inserted at all? In the citation from Judge Cooley, he says: "We do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, &c., may be made in the system of common law rules, but only that for its *definitions* we are to draw from that great fountain," &c. That is certainly sound doctrine, but I have never been

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able to see wherein the common law has ever undertaken to *define* the word "alienate," so as to limit it to a straight out and out "sale" under any and all circumstances.

Second. The proposed construction is absolutely negatived by the context of the provision. It cannot be denied that the other words in the connection, "bequeath" and "devise," confer substantial and important additional powers upon a married woman, which, before the constitution, were not allowed by the common law; yet no one has ever claimed that they were not entitled to their proper and natural meaning. As to them, and that other great power of holding property in her own name without the intervention of a trustee, we hear nothing of the alleged necessity of reading them in the light of the common law. On the contrary, it is perfectly manifest that it was the intention of those who framed the constitution to *change the common law*, and to repeal so much of it as was inconsistent with the terms used—construed in their natural and proper sense. The meaning of the word "alienate" is quite as clear and well defined as that of "devise," and if the common law is not invoked as to one, why should it be allowed to limit and emasculate the other in palpable violation of the words used, and, as I believe, of the whole scope and intention of the instrument itself? There cannot be the least doubt as to the intention of the married woman provision, as ascertained by the words used, as well as by contemporaneous construction and the acts of the legislature passed soon after the adoption of the constitution to carry into effect its provisions.

Third. The construction proposed is contrary to the clear meaning of the word itself. Instruments are generally construed to mean what the words used naturally import. "Alienate" is a general term, covering and embracing all the different modes by which property may be legally transferred. This is not only its natural and proper, but its necessary, meaning in the connection in which it appears, in order to make the whole provision consistent and harmonious in all its parts, particularly in reference to the words which follow, "by her the same if she were unmarried," &c.

Fourth. The proposed construction is contrary even to the equity doctrines, which were administered by the old Court of

Chancery before the constitution was adopted, and when a married woman had *no power* to contract, except in so far as it was given in the instrument creating her separate estate. As, for example, in the case of *Porcher v. Daniel*, 12 *Rich. Eq.*, 347 (as late as 1866), it was held that "where property of the wife is, by marriage settlement, surrendered to her 'full and free disposal'—she to have 'the sole direction guidance thereof'—she has the power, during coverture, to dispose of the same absolutely by will." In delivering the judgment of the court, Chancellor Inglis expressed what I think was the law *then*, and much more certainly what the law is *now*. "A married woman, having a separate estate, and having also a general and absolute power of disposition over it, may charge or alienate it, or any part of it, or, partially or wholly, temporarily or permanently, divest herself of her interest in it, or in any part of it, in any of the modes in which the same kind of property or things may be legally charged or alienated, &c., by one who is *sui juris*; only her intention to do this must be clearly manifested," &c. It seems to me that the unrestricted power "to alienate," is quite as comprehensive and absolute as that given by the words "full and free disposal"; and that if the constitution had never been adopted, but the power to "alienate" had been given in a deed *inter partes*, creating the separate estate of Mrs. Gwynn, it would have carried the power to use the same and to dispose of it in the manner and according to any of the different modes indicated by Chancellor Inglis. The highest court in the State, as late as 1866, said that was the law then; and it would certainly be surprising if the provisions of the constitution, which we all know were intended to enlarge the powers of a married woman over her separate estate, should be so construed as actually to diminish those powers!!

Fifth. I have already in the case of *Aultman & Taylor Co. v. Rush* indicated my view of the proper construction of the act of 1870, amended in 1882, so as to give to a married woman the express power to contract as to her separate estate, and I need not repeat it here.

I think the decree below should be affirmed.

Judgment reversed.

## WHALEY v. STEVENS.

1. The complaint in this case, liberally construed, sufficiently alleged a right of way appendant and appurtenant to plaintiff's land, and its obstruction by the defendant.
2. Where plaintiff claims by prescription a right of way appurtenant, testimony of long user of a road lying wholly on defendant's land is competent, even though insufficient of itself to establish the right claimed.
3. In charging that "if the jury find that the plaintiff has for twenty years continuously used the way over defendant's land, their verdict must be for the plaintiff," the trial judge erred in failing to distinguish between a right of way in gross and appurtenant, and in omitting to instruct them that a right of way appurtenant must have one terminus on the land to which it is appurtenant.
4. A right of way in gross is an individual right, non-transferrible, and dying with the claimant. A right of way appendant and appurtenant attaches to the estate from which it starts, and as an indispensable element of its existence it must be essentially necessary to the enjoyment of the land to which it is claimed to belong.
5. The judge should leave to the jury the force and effect of the facts of the case.
6. A private way may not be obtained by prescription across a public highway as against the owner of the soil.

Before HUDSON, J., Charleston, February, 1887.

This was an action by Thomas Whaley against William S. Stevens, commenced in Berkeley County, and by consent transferred for trial to Charleston County. See 24 *S. C.*, 479, and also 21 *Ibid.*, 221. The opinion states the nature of the action. The charge of the Circuit Judge (omitting his charge upon requests not excepted to) was as follows:

The plaintiff asks me to charge the following propositions:

*First.* "That such a right of way as that described and claimed by plaintiff in his complaint is a right of way appurtenant to the Caneslatch plantation." That is correct; the description in the complaint fulfils the description of a right of way appendant and appurtenant. \* \* \*

*Ninth.* "That if the jury find that the plaintiff's father and plaintiff after him, have for twenty years continuously and ad-



versely used the way over the defendant's land, described and claimed in the complaint, their verdict must be for the plaintiff." I charge you that that is correct. \* \* \*

The counsel for the defence asks me to charge you as follows :

*First.* "Because plaintiff, in claiming a right of way by prescription over the defendant's Seven Oaks plantation, as appurtenant to the Caneslatch plantation, as owned by his father before his purchase of three hundred acres from defendant in 1853, has laid his way in his complaint as one entire way from the plaintiff's dwelling house on said Caneslatch plantation to the Stono River, part of which is alleged to be by means of a road beginning on Caneslatch plantation and through the land of the said plantation, and over the piece of land known as the three hundred acres, originally belonging to the adjoining Seven Oaks plantation, but afterwards purchased by the said William S. Whaley, the father of the plaintiff, from the defendant, William S. Stevens, and now the property of the said plaintiff, out to the public road leading to John's Island Ferry, and in so laying his way, and in offering proof of user of a way so laid, plaintiff has shown, as to so much of the way claimed, a way lying wholly on his own land, for which plaintiff cannot prescribe." I cannot charge you that proposition. In so far as it recites matters of fact, it is left for you. I can tell you that a party cannot prescribe for a road over his own land, but in other respects that proposition is not correct.

*Second.* "Because plaintiff, in claiming a right of way by prescription over defendant's Seven Oaks plantation as appurtenant to Caneslatch plantation, as it was owned by his father before his purchase of Seven Oaks, has laid his way in his complaint as one entire way from the plaintiff's dwelling house on Caneslatch plantation to Stono River, part of which is alleged to be by means of a road beginning on Caneslatch plantation, and through the land of the said plantation, and over the three hundred acre tract purchased by his father from Stevens, out to and across the public road leading to John's Island Ferry, and in so laying his way and in offering proof of user of a way so laid, plaintiff has shown, as to so much of the way claimed, a way upon and through a public highway, for which plaintiff cannot prescribe." If it is

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intended by this proposition to say that the public highway severs and destroys the private way at that point, I cannot charge you that; and the proposition here, in so far as it involves a question of law, I cannot charge you as correct.

*Third.* "That either of the parts of the way, so far laid in the complaint, and claimed in proof, being beyond the power of plaintiff to acquire by prescription, the entirety and continuity of the way as laid in the complaint is broken, and the proof of user of the remaining part, viz., that over defendant's land and creek, does not and cannot support the complaint or prevail as evidence of prescription of the entire way as claimed." I cannot charge you that proposition, in so far as it contains a proposition of law, and, of course, the facts are all for you.

*Fourth.* "That the connection between that part of the whole way as claimed, which lies on defendant's land and that beginning on the Caneslatch plantation, being thus broken, the proof of user becomes reduced to user of a way lying between the public road and creek leading to the Stono River, a way wholly within the defendant's land, and cannot be established by such proof of user as any more than a right of way in gross, and cannot be sustained as a way appurtenant to the Caneslatch plantation." I cannot charge you that proposition. \* \* \*

*Sixth.* "That an indispensable element of a way appurtenant or appendant to a plantation or tract of land, is that it must be essentially necessary' to its enjoyment, and that when plaintiff, proved that his Caneslatch plantation on John's Island has a frontage on a public road leading to a public ferry, he proved, in his access to such public road, and by means thereof for all purposes, to market or elsewhere, which the occasions of said plantation might require, that plaintiff had the means of full and reasonable enjoyment of his said plantation, and that no other road can in law be regarded as 'essentially necessary,' and therefore appurtenant thereto." What has been proved by the evidence in this case is a question of fact for you, and whether that public road leads entirely to a ferry on Stono River is a question for you. And I furthermore instruct you that a private right of way appurtenant to a plantation, if claimed on the ground of necessity, must be alleged and fully proved, but

that the claim in the present case is not upon the ground of necessity. \* \* \*

*Ninth.* "That the previous owner being Gouverneur M. Wilkins, the life-tenant, and Ellen Screven, a *feme covert*, no adverse user could be maintained against them, or either of them, or be the means of acquiring title by prescription over Seven Oaks plantation." I charge you, gentlemen, that if there be a life-tenant in occupation of a plantation, and that life-tenant should suffer one for twenty years continuously under a claim of right to open and use a road, the life-tenant, as against him, would lose the exclusive right—that is, the adverse right would be acquired against the life-tenant, but that would not affect the remainderman. You may acquire an easement as against the life-tenant, but the moment the remainderman falls in there would be the beginning of a new possession, against which the adverse claimant would have to acquire an independent right. So that this proposition is correct.

*Tenth.* "That even if Wm. S. Whaley could have acquired title by prescription to a way by means of a road over the Seven Oaks plantation against Gouverneur M. Wilkins, the life-tenant, or Ellen Screven, the wife of John Screven, a *feme covert*, such prescription became extinguished as to the three hundred acres by the purchase of the same in 1853 by Wm. S. Whaley, the claimant." That is, in one sense of the word, correct, but would not affect this case. As to the three hundred acres which he bought and acquired fee to, he would no longer be claiming over that three hundred acre tract by prescription, but that would not destroy the road over it, if the party continued to use it. It would not itself break the continuity of the road, or suspend the right to anything beyond it.

*Eleventh.* "That such extinguishment of that part of the way claimed by prescription, which traversed the three hundred acre tract, extinguished the whole way so previously owned, as alleged." That, gentlemen, is not the correct view of the matter, and I cannot charge you that proposition.

*Twelfth.* "That the identity of the road previously acquired, as is alleged, as a road from the dwelling house on Caneslatch plantation over the three hundred acre tract to the creek on Seven

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Oaks plantation, was destroyed by such extinguishment, and could, after 1853, no longer be claimed or proved as such way by prescription in said Wm. S. Whaley." That is not a correct proposition, and I therefore decline to charge it.

*Thirteenth.* "That the appurtenancy of the way over defendant's land, that is. between the public road and the creek to the Caneslatch plantation, was wholly destroyed by such extinguishment." I decline to charge that. \* \* \*

*Fifteenth.* "That no proof has been offered showing that a way over defendant's Seven Oaks plantation and creek is necessary, or essentially necessary, to the use and enjoyment of the plaintiff's Caneslatch plantation, and, in that particular, appurtenant thereto." That is correct. It has not been proved, or attempted to be proved, that that way is essential to the enjoyment of the Caneslatch plantation, but evidence has been introduced tending to show that it is appurtenant thereto. I have deemed it best to pass separately upon these propositions, and I will now proceed as briefly as I can to give you what I conceive to be the law of this case.

A right of way over the property of a private individual may be acquired under our law by grant, or it may be acquired by prescription, or it may arise from necessity, and briefly I will expound to you the three methods: By grant is where it is in actual writing, and if granted as appurtenant to a particular piece of land, covers a way which begins on that land and terminates elsewhere. Then it is a right of way appendant and appurtenant, acquired by grant, and the grant is binding. Suppose Dr. Stevens had owned Caneslatch as well as Seven Oaks, and had sold Caneslatch to Mr. Whaley, in which deed he sold him, amongst the appurtenances, a special right of way out of his plantation and across the Seven Oaks to that particular landing. Then that would be a right of way appendant and appurtenant by grant.

A right of way from necessity may be illustrated as arising in a case of this kind: Suppose Dr. Stevens had sold to some one one hundred acres of land in Seven Oaks, with no road leading either to a water highway or public road, having, in short, no outlet. The man buying that land would acquire a right of way

out, and he could have a private way established across the balance of Dr. Stevens' land across to the public road. That is a case where it would arise from necessity, and if any dispute should arise as to that private way, then the question of its being essential would be a material question.

Now, one can acquire a private right of way by prescription, and by that we mean the use continuously of that particular road for the period of twenty years or more, adversely to the claim of the man over whose lands it runs. And if that use continues unbroken for a period of twenty years, the man acquires just the same right as if it had originated in an actual grant in writing. Although it might be a trespass in the origin, and might continue as a trespass, yet at the expiration of the twenty years it becomes a right. Now, what do we mean by adverse use? We mean either the construction of a road originally, the opening of it as and for the road of the party opening it, and the continuous, open, notorious adverse use of that road for a period of twenty years. That is what we mean by adverse. There need not be twenty years of wrangling and dispute between the parties. The whole proceeding might be friendly between the parties, but the use of that road must be as and for the property—the road of the property, and he must use it and claim it as his own.

The claim need not be by actual word of mouth, but by such conduct as amounts to an advertisement to the party owning the land that the right to come and go over it is claimed as a right. Any one who permits that use cannot, after twenty years, recall it. He cannot defeat the right—the easement. It does not involve a fee in the soil, but it establishes a right of way for persons or vehicles, and for the passage over it of whatever is necessary to transact the business of the plantation.

What we mean by a road appendant and appurtenant to a plantation, is that one of its ends or termini must begin on that plantation. It must proceed out of that plantation and then have a terminus elsewhere, and it must be continuous and unbroken. It must be a continuous road with one of the termini on the plantation of which it is appurtenant. It must be for the use of that plantation, and must be used for the benefit of that plantation. It is not necessary, as I tell you, that it should be essen-

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tial to the use of the plantation. There might be an outlet elsewhere; yet, nevertheless, if the road begins on the place and crosses the land of another, as in this case, to a landing, and it is used for the purposes of that plantation, then it is a road which pertains to, is appurtenant to, the plantation, and after the lapse of twenty years, if acquired by adverse user in that time, has the same validity as if granted in writing. As I said to you before, if it is claimed on the ground of necessity, it is not necessary that there should be twenty years' use. If it is claimed under express grant, it is not necessary that it should be used for twenty years; but where it is to be acquired by prescription, it must be by twenty years adverse, continuous, unbroken use.

You have had that diagram explained to you. The question I now ask is, is that road, beginning at A, testified to as the house of Mr. Whaley, running across the Caneslatch plantation and across the public road and on through the Seven Oaks to that landing; is it appurtenant to that plantation? The testimony is that it begins at the residence on Caneslatch, and that it follows the track laid down on that diagram. Now, you will observe that it is crossed by the public road, and that it also runs across, not only Caneslatch, but also across the three hundred acres bought from Dr. Stevens. It is contended that this public road cannot be crossed by a private path. But I charge you that the public road does not sever the continuity of the private path necessarily. I charge you that a private path or way can cross a public way, as a public road can cross another. And, furthermore, I charge you that the three hundred acre tract that was bought by Mr. Whaley and was added to Caneslatch, and through which the road runs, does not break the continuity of the road. Whilst the plaintiff cannot prescribe for a road over his own land, yet the road must begin on his own land and run over part of it in order to be appurtenant. It must touch it and go into it. He does not hold this road to the public road by prescription, because he has the fee in the land, but the question is, is it the beginning of the road which goes to the landing?

I charge you that a private road can cross a public road which already exists, and have continuity on both sides of the public road, just as well as a private way already having continuity

would not have its continuity broken by having a public road established across it. Suppose there had been no public road established when this private road was laid out, and that subsequently the public road was established across this private way already established? That would not break the continuity of the private way. So it is for you to determine from the evidence in this particular case what were the original ends or termini of that road. Does the private path start at Whaley's house and cross the public road, through the Seven Oaks, to the landing? If it was established that way, then it has continuity across the public road and down to the landing.

Now, is it appurtenant to the place? Not merely that it has one terminus on the place, but was it established for the benefit of the plantation, was it used for the plantation, and did it become a part and parcel of it and appendant to it? If so, and if the plaintiff has established that this was done adversely against the defendant for a period of twenty years, openly and notoriously, then the plaintiff has established his right to that easement. Now, suppose that Mr. Whaley had acquired title by twenty years adverse user against Ward, that would continue; but if there is no evidence of the length of time, just throw that out. I do not care how long Mr. Whaley used it as against Screven, so that brings us to 1853, when Stevens became the owner of Seven Oaks.

Now, if this adverse use was kept up for twenty years from Whaley's house through his plantation, across the public road, across Seven Oaks to the landing, and it was called the Canes-latch landing road, and was used by Mr. Whaley in his life-time, and afterwards by his son, as and for their road, as their property—their right continuously against the rights of the owner of Seven Oaks, then Whaley has a title to the right of way. And if Mr. Stevens simply stood by and permitted it, if he remained friendly, but saw them using it, as and for their property, ditching and working it, and exercising acts of ownership over it, then Stevens is estopped the right to shut it up. But if before the twenty years ran out Stevens shut it up, and the shutting up was acquiesced in by Whaley, or if it was used by the Whaleys by permission of Stevens, then that would change the question. It is for

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you to say whether they were using it by permission, or as their own right; and whether it is as appurtenant and appendant to that plantation or not. It is for you to say whether it is a continuous road or not. You are to look at it as a mere matter of law as coming from me, and as a mere matter of fact as coming from the witnesses, and you must not be influenced by any ulterior reasons whatever.

If there is any injury here which you can estimate in dollars and cents, you have a right to give damages for such injury. If you find for the plaintiff, you cannot give punitive damages, if the obstruction was done in a peaceful manner. You could not punish Stevens for shutting up, if he did so quietly, under a claim of right. But if he did not do so quietly, and not under a claim of right, then you can find against him damages to punish for the vindictiveness.

The jury found for plaintiff the right of way.

From the judgment entered on this verdict, the defendant appealed upon exceptions too numerous and lengthy to be inserted here, but alleging error to the Circuit Judge in his charges upon the requests above stated, and in other portions of his charge.

*Mr. T. G. Barker*, for appellant.

*Messrs. Inglesby & Miller*, contra.

December 12, 1887. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff, respondent, brought the action below to recover damages for obstruction to a right of way alleged to be appendant and appurtenant to plaintiff's "Caneslatch" plantation. The defendant demurred orally on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled by his honor, Judge Hudson presiding, and the case proceeded to a verdict for the plaintiff. The exceptions allege error to the judge, first, because the demurrer was not sustained, and then to the admission of certain testimony; to his refusal to charge certain requests, and to his charge in several particulars.



First. Did his honor err in overruling the demurrer? A complaint is obnoxious to a demurrer of the kind interposed here, when the plaintiff will fail in his action unless he proves other facts than those alleged in the complaint; in other words, when assuming the facts alleged to be true, yet upon said facts alone he cannot recover, as matter of law. Testing the complaint by this rule, we think the demurrer was properly overruled. It is true, the complaint is not as definite in the allegations of the particular facts upon which the right of way claimed rests, as it might have been. A right of way founded upon prescription, and claimed to be appendant and appurtenant to a certain close or plantation, must have one of its termini upon the plantation to which it is claimed to be attached. It must have been in the adverse use of the claimant and those under whom he claims for at least twenty years, and in some kinds of ways at least, appendant and appurtenant, it must be essential to the enjoyment of said close or plantation; and perhaps there may be some other requisites.

These facts do not appear in terms in the allegations of the complaint, but we think they are covered by the general allegation "that the said William S. Whaley, during his life-time, and the plaintiff since his death, had a right of way by prescription on foot and with horses, \* \* \* by means of a road beginning on the said Caneslatch plantation, and appendant and appurtenant thereto, \* \* \* out to and across the public road leading to John's Island Ferry, through, over, and upon the adjoining lands of the said defendant, known as the Seven Oaks plantation." It seems to us that this general allegation by a liberal intendment included the necessary probative facts above, and entitled the plaintiff to offer testimony thereto, and which, upon the demurrer, was properly assumed to be admitted.

Next, as to the admission of certain testimony. The point made by the appellant is, "That his honor erred in permitting testimony under the complaint to be given of user of a road which lay wholly on defendant's land, and to allow such testimony to go to the jury as proof of user of the way claimed in the complaint." The folio at which this alleged testimony was allowed is not pointed out, nor have we been able to find from an examination

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of the "Case" where any objection was interposed by appellant, raising the question here made. When the plaintiff was upon the stand as a witness the appellant objected several times, but no where as to testimony of the character mentioned, nor have we been able to find that any such objection was interposed to the testimony of either of the other witnesses introduced by the plaintiff, at the time of their examination. But, supposing that we may have overlooked the objection, we may say that the objection is untenable. The question involved was the adverse use of the road by the plaintiff and his father, how long, &c. The road on the defendant's land was the road prescribed for, and testimony as to its adverse use, it appears to us, was competent at least, its value being dependent upon the fact, whether said road could be connected with the "Caneslatch Plantation" in such long adverse use as to make it appendant and appurtenant thereto.

Next, that his honor erred in charging, "That if the jury find that the plaintiff's father and plaintiff after him, have for twenty years continuously used the way over defendant's land, described and claimed in the complaint, their verdict must be for the plaintiff." There are two kinds of ways, to wit: ways appendant and appurtenant, and ways in gross. The first is attached to and belongs to land, inheres in it and goes with it, and is entitled to be enjoyed by whomsoever becomes possessed thereof, in whole or in part; the second is a personal right, and is not transferable. Twenty years adverse use is a necessary condition to the obtaining of both of these ways by prescription. But in reference to a way appendant and appurtenant, something more is necessary, to wit: such a way must have one terminus upon the close to which it is claimed to be appurtenant, it must inhere in said close, and it must be essentially necessary to its enjoyment, while with a way in gross these conditions are not necessary. That kind of way rests entirely upon the adverse use. Now, in view of these principles, we think the charge of his honor here was erroneous, as it based the right of recovery by the plaintiff simply upon his adverse use and that of his father, not explaining the difference between the two kinds of ways and letting the jury understand that in this action, claiming, as it did, a way

appurtenant and appendant to the Caneslatch plantation, it was necessary to prove nothing more than twenty years adverse use by his father and himself, of the road described. The charge applied to a way in gross as much as to a way appurtenant, and we think was on that account misleading.

Next, error is alleged, because his honor declined to charge upon request, that an indispensable element of a way appurtenant and appendant is that it must be "essentially necessary" to the enjoyment of the plantation to which it is claimed to belong. His honor not only declined this request, but charged to the reverse, saying that it was not necessary that the "way should be essential to the use of the plantation," thus eliminating that feature from the case, and from the consideration of the jury. The important difference between a way appurtenant and one in gross, as has already been stated, is, that a way in gross is an individual right, non-transferable, and dying with the claimant. A way appurtenant, however, makes the estate to which it is attached a dominant estate and the one over which it runs a servient one, and this relation lasts as long as the estates last, and it inheres, not only in the dominant estate as a whole, but to every portion and subdivision thereof. It is a complete servitude which runs with the land. It would seem in principle, therefore, that before such an important right should be acquired by one close over another, that there should be some necessity therefor, it should not be a mere matter of convenience. And such seems to be the law.

This court said in the former appeal, through Mr. Justice McIver, delivering the opinion: "That a way to be appurtenant, it must adhere in the land and be *essentially necessary to its enjoyment*" (*Whaley v. Stevens*, 21 S. C., 223), and further that the complaint therein was defective as a complaint for a way appurtenant—"that it did not allege that it was necessary for the enjoyment of the land known as Caneslatch." Mr. Washburne says: "Ways are said to be appendant or appurtenant, when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be *essentially necessary to their enjoyment*." *Washb. Eas.*, ch. 11, § 5, page 217.

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We think the refusal of the judge to charge as requested on this subject, was in conflict with these authorities, as well as his charge thereon.

We do not think that his honor erred in declining to charge as requested, "That either of the parts of the way so laid in the complaint and claimed in proof being beyond the power of plaintiff to acquire by prescription, the entirety and continuity of the way as laid in the complaint is broken, and the proof of user of the remaining part, *viz.*, that over defendant's land and creek, does not and cannot support the complaint, or prevail as evidence of prescription of the entire way as claimed." This request involved the force and effects of facts, of which it was the province of the jury to consider and not the judge.

The appellant further excepts, that his honor charged that a private way might cross a public road as well as a public road might cross another. Supposing that his honor meant that a private way might be obtained by prescription across a public highway, as against the owner of the soil, we think this was error. *Wash. Ease.*, 138, 164; *Wait Act. & Def.*, 695; *State v. Jefcoat*, 11 *Rich.*, 529; *Hamilton v. White*, 5 *N. Y.*, 9. Besides, the principles upon which a private right of way may be prescribed for would seem to exclude this. Prescription is founded upon adverse use for a period of at least twenty years, adverse to some one who has the right to object, and who did not object. Upon such use the law presumes a grant from the former owner arising from his long acquiescence. To give this prescription a safe foundation, however, of course the former owner must know of the adverse use and must have been in condition to have opposed it, with the right to do so. Now, in the case of a public highway, every citizen has the right to be upon it, and to use it as he may desire, to go up and down, or across it. And we do not see how using a public highway can be adverse to the rights of the owner of the soil upon which it runs. Every one has the right to be there because it is a public highway, and the owner of the soil, even if he knows that one is there, has no right to object, and his acquiescence cannot be properly construed into an acknowledgment that the party is there by virtue of some

private claim, to which he is presumed to have assented and which may ripen into the presumption of a grant.

It is the judgment of this court, that the judgment below be reversed on account of the errors herein above.

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AGNEW v. RENWICK.

1. A and B purchased together a tract of land and several slaves and other personalty to be worked by them in partnership, and at the same time gave their mortgage on this and other property, and pledged other collaterals, to secure the purchase money. Afterwards they offered this purchased property for sale, and B bid off the land and a portion of the personalty and assigned his bid to C, to whom both A and B made deeds of conveyance, and to whom the mortgagee released and relinquished all the lien of said mortgage on the land and personalty purchased by him. The purchase money was paid by C to the mortgagee. The wife of A did not renounce her dower, and more than twenty years after this, A having died, she brought this action to recover dower in one-half of this land. *Held*, that she was entitled to the dower demanded.
2. Petition for rehearing refused.

PER McIVER, A. J.

3. The paper executed by the mortgagee to C was only a release of the mortgage lien upon the property purchased by him, and gave him no interest in the mortgage; but if construed as an assignment, the mortgage was extinguished, C thereby becoming the mortgagee of his own property. The only exception to this rule is where, as in *Agnew v. Railroad Company* (24 S. C., 18), there is an express agreement to prevent the merger.
4. More than twenty years having elapsed since the maturity of the mortgage debt, the law will presume the mortgage satisfied.
5. The sale to C was not under or through the mortgage, notwithstanding the purchase money was, by agreement, credited on the mortgage.

Before KERSHAW, J., Newberry, July, 1886.

This was an action by Julia F. Agnew against Marcellus A. Renwick and others, for dower. The opinion states the case. The Circuit decree was as follows :

The respondents in this case appeal from the decree of the

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probate judge, allowing dower in the lands described in the petition to the extent of one moiety thereof, whereof the husband of petitioner was seized during coverture jointly with one Daniel R. Sartor. In so far as the appeal is based upon the fact that the land in question was purchased by Agnew & Sartor as partners and for partnership purposes, this court concurs with the judge of probate; that question is concluded against the appellants by the very recent decision of the Supreme Court in the case of *Bowman v. Bailey* (20 S. C., 553), which case is on all fours with this in that respect.

The chief difficulty in this case arises out of the defence of the existence of the mortgage given by Agnew & Sartor for the purchase money of the land, assigned to the Bank of the State of South Carolina, and by it released to Kinard & Renwick, who afterwards purchased the land in question from Agnew & Sartor, and thus united in themselves the rights of mortgagors and mortgagees; owners of the fee and of the encumbrance. The respondents here claim under Kinard & Renwick.

In his conclusions this court cannot concur, in this regard, with the court below. It is admitted that whether the release of the mortgage was to operate as an assignment or a discharge of the mortgage, is a question of intention. The probate judge says, "The release does not seem to be intended as an assignment." An examination of the facts shows that the release was executed December 27, 1858, whereas the interest of Agnew was not acquired by them until April, 1859, and the interest of Sartor April 6, 1859. The consideration given to procure the release to them of the mortgage was \$35,574.12, secured to the bank by the said Agnew & Sartor. Can it be imagined that it was their intention that the mortgage should be satisfied or discharged when in that case they would have had no security for so large an amount of money, other than possibly the mere verbal agreement on the part of Agnew & Sartor, that they would convey at some future time? I cannot so conclude without doing violence to all the probabilities. The intention could not have been otherwise than to hold the mortgage as their security to compel a conveyance, or by foreclosure to secure the title.

The next question is whether the mortgage merged into the

legal estate in the land after it was acquired by Kinard & Renwick. This, too, is a question of intention. Says Mr. Pomeroy (2 *Pom. Eq. Jur.*, § 790): "When the owner of the fee becomes absolutely entitled in his own right to a charge or encumbrance upon the same land, with no intervening interest or lien, the charge will, at law, merge in the ownership and cease to exist. Under like circumstances a merger will take place in equity when no intention to prevent it has been expressed and none is implied from the circumstances and interests of the party." The rule is stated on the authority of the case of the *Insurance Company v. Murphy* (111 *U. S.*, 744), as follows: "If there is no reason for keeping the mortgage alive, such as the existence of another incumbrance, then equity will, in the absence of any declaration of his intention, destroy it. In short, when the legal ownership of the land and the absolute ownership of the incumbrance become vested in the same person, the intention governs the merger in equity." *Agnew v. C. C. & A. R. R. Company*, 24 *S. C.*, 18. Mr. Jones, in his treatise on mortgages (sec. 848), says: "If the owner has an interest in keeping these titles distinct, or if there is an intervening right between the mortgage and the equity, there is no merger"—quoted in the opinion of the court in 111 *U. S.*, 744, *supra*. We cannot escape the conclusion that the mortgage did not merge in this instance, but that the title remained distinct.

In answer to this view it is urged that nevertheless the mortgage is extinguished by lapse of time and the presumption of payment. It is replied that this presumption cannot arise, because after the transfer of the mortgage and the title to the land to Kinard & Renwick, no action could have been brought on the mortgage, and it was only held to protect their title. There was nobody to pay it. It was their interest that it should be kept open as a valid and subsisting lien upon their land. And they had a right to so retain it. They unite in their own persons the position of mortgagee and owner of the land subject to it: and have the same power to keep open the encumbrance as if the rights were held by different persons who agreed to keep up the encumbrance. While they are willing it should remain so, the demandant in dower cannot complain or have any advantage

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thereby. If she came forward with an offer to redeem, she might thereafter be in a position to complain of it. No presumption of payment can arise when the very object of acquiring the mortgage was, as we have seen, to protect the title, nor when the persons to receive the payment are the same who are to pay it. The position of payer and payee must be adverse, before there can arise the presumption of payment arising from lapse of time.

The case of *Agnew v. Railroad Company*, already referred to, decides that where the intention to keep open a mortgage assigned to the purchaser of the land is expressed, a purchaser of the same land under execution against the mortgagor could not recover the land from the assignee and grantee, the judgment under which the plaintiff claimed being subsequent to the mortgage, but prior to the assignment thereof and conveyance to defendant. Here the intention is implied, and the result is the same as if expressed, and the mortgage remained open to protect the title.

Under these circumstances what are the rights of the demandant? She had no legal right of dower, but only an equitable right to be endowed of the surplus, if any should remain after payment of the mortgage debt and full satisfaction thereof.

It devolved upon her to show under these proceedings that there was a surplus of which she was entitled to be endowed. She has failed to do so. On the contrary, the evidence shows that there was no surplus. The land was put up for sale at public auction after ample notice of the sale on a credit of one, two, and three years, and bid off at a sum constituting but a small part of the mortgage debt. The price bid was \$19,065, while the mortgage was given for \$64,000. True, there was other property included in the mortgage, and other property bought with the land and forming a part of the consideration of the debt for which it was given, but it was held in *Calhoun v. Calhoun* (2 S. C., 286), that "a widow can only take dower in land mortgaged by the husband at the time of the purchase, and as part of the same transaction, subject to the payment of the entire mortgage debt, whether the same was in whole or in part only for the purchase money of the land, provided the same is recoverable at law." This was the language of Chancellor Johnson, concurred in by the court.



It required the entire amount for which the land and personal property sold to satisfy the bank and to procure the assignment from them of the mortgage, and there could, therefore, be no surplus. There is no allegation or pretence that the property sold at an undervalue. In the absence of some proof tending to show that there might remain a surplus of which she might be endowed, the demandant's action must fail. I think these propositions are fully sustained by the result of the authorities cited below, as well as many others: *Crafts v. Crafts*, 2 *McCord*, 54; *Brown v. Duncan*, 4 *Id.*, 350; *Stoppelbein v. Shulte*, 1 *Hill*, 200; *Klinck v. Keckley*, 2 *Hill Ch.*, 252; *Rickard v. Talbird*, *Rice Ch.*, 169; *Wilson v. McConnell*, 9 *Rich. Eq.*, 514; *Tibbets v. Langley Man. Co.*, 12 *S. C.*, 466.

It is ordered and adjudged, that the judgment of the Probate Court be reversed, and that the cause be remanded to the Probate Court, to be there dismissed with costs to the respondents, to be paid by the demandant.

Plaintiff appealed.

*Messrs. Goggans & Herbert*, for appellant.

*Mr. M. A. Carlisle*, contra.

December 12, 1887. The opinion of the court was delivered by

MR. JUSTICE McIVER. In April, 1857, Daniel R. Sartor and Samuel T. Agnew bought from one Rice Dulin a plantation, containing 1271 acres of land and forty-eight slaves, together with sundry other articles of personal property, for the sum of sixty-four thousand dollars. No part of the purchase money was paid in cash, but the same was secured by the bond and mortgage of the said Sartor and Agnew, which mortgage covered the said land and slaves so purchased, as well as eighty-two other slaves, belonging to the mortgagors. On May 6, 1857, this mortgage was assigned by Dulin to the Bank of the State of South Carolina. Sartor and Agnew after carrying on the plantation for about two years, on December 6, 1858, entered into an agreement in writing, to the effect following: that their part-

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nership in planting should be dissolved ; that the entire partnership property should be sold on December 27, 1858, on a credit of one, two, and three years, the purchase money to be secured by bond with two good sureties, to be "approved by the Bank of the State, and a mortgage of the property if required," and that the securities taken at such sale should be transferred "to the said bank in release of our liability for the purchase money of said property."

In pursuance of this agreement the property was advertised for sale by Sartor & Agnew, with a slight variation as to the terms, whereby all sums under fifty dollars were to be paid in cash before the delivery of the property, the advertisement containing a statement that "Col. S. Fair [who was the attorney representing the bank] will receive all bonds or payment for the purchases of the property as our agent." The property was accordingly offered for sale at the time designated, when the land and a considerable amount of the personal property was bid off by Sartor at the sum of about \$35,000. Col. Fair attended the sale, the mortgagors, Sartor & Agnew, being also present, and all the proceeds of the sale were delivered to Col. Fair as attorney for the bank. Sartor failing to comply with his bid, the same was transferred to John P. Kinard and James A. Renwick, but the time when such transfer was actually made does not appear. It does appear, however, that an endorsement, bearing date December 27, 1858, was made upon the list of the property bid off by Sartor, of which the following is a copy :

"South Carolina, Newberry District. Know all men by these presents that I, Simeon Fair, as agent and attorney in fact for the president and directors of the Bank of the State of South Carolina, in consideration of the sum of thirty-five thousand five hundred and seventy-four dollars and twelve cents, secured to be paid by three several promissory notes, payable to Thomas R. Waring, cashier, or bearer, dated December 27, 1858, with interest payable, do hereby release and relinquish unto John P. Kinard and James A. Renwick, their heirs and assigns, all the lien of a mortgage held by the president and directors of the Bank of the State on a certain tract of land, containing 1271 acres described in said mortgage, given by D. R. Sartor and

Samuel T. Agnew to Rice Dulin, and by him assigned to the said bank, dated April 12, 1857, and also release the following slaves contained in said mortgage to wit: [naming them] twenty-two in all, from all lien of said mortgage." This endorsement was originally signed "S. Fair, attorney for bank, per J. Elvin Knotts," but was afterwards, by writing, dated February 17, 1860, confirmed by Col. Fair. The notes referred to in this endorsement, as set out in the "Case," are signed by John P. Kinard and James A. Renwick, as principal, and by two other persons as sureties, and bear date December 27, 1858.

It also appears that D. R. Sartor, by deed bearing date April 6, 1859, conveyed to Kinard & Renwick all his interest in the tract of land, containing 1,271 acres, and that the assignees of Agnew, who had, on March 9, 1859, made an assignment for the benefit of his creditors, by their deed, bearing date the day of April, 1859, after reciting the making of the assignment, the fact of the sale on December 27, 1858, at which Sartor had bid off the land and failed to comply, and his consent that Kinard & Renwick should take the same at his bid, together with the fact that Sartor had by his deed above mentioned conveyed his interest to Kinard & Renwick, proceed to convey the interest of Agnew to said Kinard & Renwick. It also appears that, by an agreement under seal, purporting to have been executed on April 5, 1859, between Sartor of the first part, and Kinard & Renwick of the second part, Sartor agreed to "sell and convey to them, by good and perfect titles, all the property, both real and personal, which he, the said D. R. Sartor, bid off at the sale of Agnew & Sartor, and at the price there given," and the said Kinard & Renwick agreed to take the same, and "to apply the purchase money of the said property to the mortgage debt due the Bank of the State by the said Agnew & Sartor, according to the terms of the sale of the said Agnew & Sartor." It further appears that the Bank of the State had received from Sartor three notes, amounting to twelve thousand dollars, as collateral security for the bond of Sartor & Agnew given to Rice Dulin, and by him assigned to the bank. It further appears that at the time of the sale, made on December 27, 1858, there were judgments to a large amount then remaining due and unsatisfied

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which had been recovered against S. T. Agnew individually, and as a member of a firm known as S. T. Agnew & Co., subsequently to the execution of the mortgage held by the bank.

S. T. Agnew having died on September 21, 1873, this proceeding was instituted by the demandant as his widow on April 13, 1883, in the Probate Court, whereby she claimed that her dower in the one undivided half of the 1,271 acres of land, now in the possession of the defendants claiming under the said Kinard & Renwick, should be admeasured to her. This claim was resisted substantially upon two grounds. 1st. Because the land was held by Sartor & Agnew as partners, and the partnership debts being unpaid, no right of dower attaches until the same are paid, and then only in Agnew's share of any surplus that may remain after the payment of the debts. 2d. Because the mortgage given to secure the purchase money of the land being unpaid, no right of dower can attach.

The judge of probate overruled both of these defences and rendered a decree that the demandant was entitled to dower out of one-half of the land. From this decree defendants appealed to the Circuit Court, and the Circuit Judge, sustaining the judge of probate on the first ground, overruled him on the second, rendering judgment that the cause be remanded to the Probate Court to be there dismissed with costs. From this judgment demandant appeals upon the several grounds set out in the record, which raise the general question whether the mortgage and the transactions connected therewith are sufficient to defeat the claim of dower.

There can be no doubt that a widow is entitled to dower in lands mortgaged to secure the payment of the purchase money at the same time the mortgagor acquires title, but such right is subordinate to the lien of the mortgage. As against all persons other than the mortgagee, or one claiming through the mortgagee, her right to dower cannot be disputed by reason of such mortgage. *Stoppelbein v. Shulte*, 1 *Hill*, 200; *Klinck v. Keckley*, 2 *Hill Ch.*, 250; *Wilson v. McConnell*, 9 *Rich. Eq.*, 512. So that the practical inquiry in this case is whether the defendants can avail themselves of the mortgage given by Sartor & Agnew to Dulin, and by him transferred to the Bank of the State as a

bar to demandant's claim of dower. This depends upon two inquiries, first, whether the mortgage was ever transferred to Kinard & Renwick, and was held by them as an open subsisting lien upon the land; or, second, whether they can be regarded as purchasers under the mortgage.

The first inquiry involves the construction and effect of the endorsement, a copy of which is hereinbefore set out, which was placed upon the sale bill of the articles bid off by Sartor at the sale on December 27, 1858, which bid was afterwards transferred to Kinard & Renwick. This paper certainly is not, in form, an assignment of the mortgage, or any part thereof. There is not a word in it which indicates any intention to transfer the mortgage. Its language imports nothing more than a surrender of the lien of the mortgage to those who had become, or were about to become, purchasers of the mortgaged property from the mortgagors, so that they might take the property free from the lien of the mortgage. It must be remembered that the mortgage covered a very large amount of property—eighty-two slaves—besides that originally purchased from Dulin by Sartor & Agnew, and that the whole amount of property included in the mortgage was probably considerably more than double the value of the property which Kinard & Renwick proposed to purchase from Sartor & Agnew, and that the amount of the mortgage debt was more than double the amount of the purchase of Kinard & Renwick.

It is inconceivable that the bank, holding a mortgage on such a large amount of property to secure the payment of a bond for sixty-four thousand dollars, upon which the interest had been running for nearly two years, would have been willing to transfer such mortgage in consideration of the three notes of Kinard & Renwick for only \$35,574.12, especially when the bank, in addition to the security afforded by the mortgage held as collaterals the notes of Sartor and others, of the face value of twelve thousand dollars. But it is very easy to understand why the bank should have done just exactly what the language of the paper imports—release the lien of its mortgage—not upon all the property included in the mortgage, but only on the property purchased by Kinard & Renwick, in order to secure a partial payment upon its

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large debt. The language of the paper in question, as well as all the circumstances, show clearly that the intention was to do what is very often done in such cases, viz., that the mortgagor having found a purchaser for a portion of the mortgaged property, the mortgagee agrees to release the lien of the mortgage upon the property so sold by the mortgagor, upon the condition that the proceeds of such sale should be applied to the mortgage debt. How such an arrangement can be regarded as an assignment or transfer of the mortgage, it is very difficult, if not impossible, to understand.

But even assuming that the paper in question could be regarded as an assignment or transfer of the mortgage, or at least the lien thereof, so far as it affected the property bought by Kinard & Renwick, how does that affect the question of the demandant's right to dower? There is some controversy as to whether the several papers introduced in evidence were really executed on the dates which they bear. The endorsement on the bill of sale containing the list of the property bid off by Sartor, which is claimed to operate as an assignment of the mortgage to Kinard & Renwick, as well as the notes given by them to the bank bear date December 27, 1858—the day of the sale—while the agreement for the transfer of this property by Sartor to Kinard & Renwick bears date April 5, 1859, and the deed for the interest of Sartor in the land to Kinard & Renwick is dated April 6, 1859, and the deed from the assignees of Agnew to Kinard & Renwick for his interest in the land bears date the      day of April, 1859.

Governed by these dates, it would seem then that Kinard & Renwick took from the bank a release of the lien of the mortgage, or, under the assumption upon which we are now considering the case, took the assignment of the mortgage and executed their notes to the bank *before* they had purchased the property from Sartor, or, so far as appears in the "Case," before Sartor's bid had been transferred to them. This seems to be hardly probable, especially when taken in connection with the testimony of Kinard, that "Agnew had made an assignment of all his property before we bought the property," which assignment bears date March 9, 1859; and the more reasonable conclusion would seem to be, from these and other circumstances which it is need-

less to mention, that the endorsement and the notes of Kinard & Renwick were not really executed on the day on which they are dated, but after the purchase made by Kinard & Renwick from Sartor, and dated back to the day of sale in order that they might bear interest from that date, or for some other reason then deemed sufficient.

But waiving this and assuming that the Circuit Judge was right in considering the several papers as having been actually executed on the dates which they bear, what was then the real nature and legal effect of these transactions? Under this view, taking it in the light most favorable to the defendants, the transaction amounted simply to this—that Kinard and Renwick took an assignment of a portion of the mortgage, giving their notes to the bank for the amount specified, and *afterwards* purchased from the mortgagors the property covered by so much of the mortgage as had been transferred to them, and instead of paying the purchase money of such property to the mortgagors, assumed the payment of so much of the original mortgage debt as such purchase money amounted to, by giving their notes for the same to the bank. Reduced to its simplest form, the transaction amounted to a purchase by the mortgagee from the mortgagor of the mortgaged premises, not under proceedings for foreclosure, but at private sale. Now, under the admitted general rule, the legal effect of such a transaction is to extinguish the mortgage, and the only exception to this rule, recognized in this State, is that established by the case of *Agnew v. Railroad Company*, 24 S. C., 18, and this court has said in *Blekeley v. Branyan* (26 S. C., 424): “We cannot venture to go further in relieving a mortgagee who purchases the mortgaged property than was indicated in the case of *Agnew v. Railroad Company*, *supra*.”

So that the inquiry is narrowed down to the inquiry, whether the case now under consideration can be brought within the exception recognized in Agnew's case. In that case, when the mortgagee purchased the mortgaged property from the mortgagor there was an *express* covenant inserted in the deed that the mortgage should “remain open to protect against claim of dower, liens, and encumbrances.” This was clearly the extent of the exception to the well settled general rule recognized in that case, as is

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shown by the subsequent case of *Bleckeley v. Branyan*. Where parties have taken the precaution to protect themselves against the operation of the general rule, by an express covenant to that effect, they then bring themselves under the exception recognized in Agnew's case, beyond which this court has said it will not venture to go; but where no such precaution has been taken, then the case must fall under the operation of the general rule. As was said in *Navassa Guano Company v. Richardson* (26 S. C., 401), in speaking of Agnew's case: "In that case there was an *express agreement* inserted in the deed that the mortgage should remain open for the protection of the defendant against intervening encumbrances, and this might be regarded as evidence that the payment of the mortgage debt was not absolute, but conditional; that if the mortgage was preserved, then the conveyance was accepted in satisfaction of the mortgage debt, but if the lien was not preserved, then the conveyance should not operate as satisfaction."

Now, in the case under consideration it is quite certain that there was no express agreement or covenant that the mortgage should remain open as a protection against intervening encumbrances, and hence the case cannot be brought under the exception recognized in Agnew's case. Indeed, it would be very difficult, if not absolutely impossible, to find any evidence whatever, either written or otherwise, tending to show that the parties had any intention to keep the mortgage open as a protection against dower or any other encumbrance. The only possible ground for such an inference would be the fact that, *as it has turned out*, it would have been to the interest of the mortgagees that such an agreement should have been made, but, as was held in *Bleckeley v. Branyan, supra*, that would not be sufficient; for, as there said, if so, it would be impossible to conceive of a case where such an inference could not be drawn, and thus the well settled general rule would become absolutely useless whenever it became necessary to apply it. From this it follows that the defence set up to the claim of dower based upon the mortgage, cannot in any view of the case be sustained, and that the Circuit Judge was in error in ruling otherwise.

There is also another ground upon which such defence should



be defeated. While a widow can only claim dower out of land mortgaged to secure the payment of the purchase money contemporaneously with the acquisition of title by her husband, subject to the payment of the mortgage debt, or, as some of the cases express it, her claim is subordinate to the lien of the mortgage, yet when the mortgage debt is paid or otherwise extinguished, the lien of the mortgage is gone, and there is then nothing in the way of the claim of dower—nothing to which it is subordinate. Indeed, it is well settled in this State that where a husband dies seized of land covered by a mortgage upon which his wife has renounced her dower, or which being given to secure the payment of the purchase money of the land is superior to the claim of dower, the widow has an equity to require the executor or administrator to apply the personal assets, even though to the prejudice of simple contract creditors, in payment of the mortgage debt, so as to let in the widow's claim of dower. See *Wilson v. McConnell*, 9 *Rich. Eq.*, 500, and *Henagan v. Harllee*, 10 *Ibid.*, 285.

Now, in this case the bond which the mortgage was given to secure was dated April 13, 1857, and it is said was payable in one and two years. So that assuming that the last instalment fell due in 1859, it must be presumed paid by lapse of time, more than twenty years having elapsed several years before these proceedings were commenced, there being no evidence of any intervening acknowledgment or promise by the mortgagors—nothing to rebut the presumption of payment. If, then, the bond must be regarded as paid, the lien of the mortgage was likewise extinguished, and therefore when these proceedings were commenced, the mortgage, no matter in whose hands it may have been, afforded no bar to the claim of dower. The position taken by the Circuit Judge and relied upon by the respondents here, that this presumption cannot arise when the object of acquiring the mortgage was to protect against intervening encumbrances, is not tenable, because, as has been shown above, such was not the fact. But even if it was, it is not easy to perceive why this should prevent the presumption from arising. If the union of the character of payor and payee in the same person does not work payment by operation of law, and if payment

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cannot be presumed after *any* length of time, then it would follow that the mortgage debt could never be regarded as paid—a conclusion which would not be readily accepted.

The only remaining inquiry is, whether Kinard and Renwick can be regarded as purchasers under or through the mortgage. It is quite certain that the mortgage does not invest the mortgagees with power to sell, and it is equally certain that the sale did not even purport to have been made under any such assumed or supposed power. Nor is it pretended that the sale was made under any proceeding to foreclose the mortgage. On the contrary, the sale was made by the mortgagors of their own motion, so far as appears, for the purpose of closing the partnership between Sartor and Agnew, under an agreement between them, to which the mortgagees were not parties, that the proceeds of the sale should be applied to the mortgage debt. There is no evidence that the bank, then holding the mortgage, had anything to do with making the sale. On the contrary, Sartor in his testimony says the sale was agreed to “by Agnew and myself, *no one else being instrumental in effecting it.*” The agreement for the sale and the advertisement of its terms were signed by Sartor and Agnew alone, and no one else appeared to have anything to do with it.

The provision in the agreement that the proceeds of the sale should be turned over to the bank, was quite natural under the circumstances. Both Sartor and Agnew were bound for the payment of the debt, and therefore it was very proper that the proceeds of the sale should be so applied, to say nothing of the fact that, without some such arrangement, the property, covered as it was by the mortgage, would not have been likely to bring much. But what is absolutely conclusive is the fact that so experienced a lawyer as Col. Fair was known to be should have taken the trouble to prepare and execute a release of the lien of the mortgage on the property bid off by Sartor at the sale; for if the property was considered as sold *under the mortgage*, that of itself would have operated as a discharge of the lien of the mortgage, and the release executed by Col. Fair would have been wholly unnecessary. It is clear, therefore, that the sale was not made under the mortgage, and the title of the purchasers was not de-

rived through that instrument. They took their title directly from the mortgagors, and to protect themselves against the lien of the mortgage, obtained a release of such lien from the mortgagees.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for the purpose of carrying out the conclusion herein reached.

MR. CHIEF JUSTICE SIMPSON and MR. JUSTICE McIVER concurred in the result.

A petition was filed by defendants praying the court to grant them a rehearing of the case. Upon this petition the following order was endorsed January 19, 1888:

PER CURIAM. We have carefully considered this petition, and finding that no material fact or principle of law has been overlooked in the decision heretofore rendered, there is no ground for a rehearing. It is therefore ordered, that the petition be dismissed.

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CARRAWAY v. CARRAWAY.

1. An unrecorded mortgage is good between the parties and as to all others, except subsequent creditors or purchasers for valuable consideration without notice. *Gen. Stat.*, § 1776.
2. An unrecorded mortgage has priority over judgments based upon debts contracted prior to the mortgage, but entered thereafter without notice of the mortgage—they being existing, and not subsequent creditors.
3. The case of *King v. Fraser*, 23 S. C., 543, stated, and this case distinguished therefrom.

MR. JUSTICE McGOWAN, *dissenting*.

Before WALLACE, J., Georgetown, November, 1886.

This action was commenced October 11, 1885. The order of reference was passed January 29, 1886, and the references were held during the summer of that year. The Circuit decree was as follows:

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From this state of facts, the only controversy in the case arises. Hirsch claims that notwithstanding the fact that his mortgage has never been recorded, it is good and valid as a mortgage as against debts in existence at the time of its execution, although their holders had no notice of the mortgage. The holders of these claims, which have been put into judgments, stand upon the liens of their judgements.

An elaborate consideration of this issue is rendered unnecessary by the recent case of *King v. Fraser*, 23 S. C., 543. This case already takes rank as a leading case in questions arising upon the registry act of 1876 (Gen. Stat., § 1776). In that opinion, at page 565, it is said: "While the lien of a mortgage not recorded in time is in abeyance for the lack of registry, other creditors of the mortgagor may come in and acquire liens upon his property which will take precedence over the mortgage without regard to its date. This is not expressly declared, but results necessarily from the postponement of the lien of the mortgage and the general nature of liens, of which time is the essential thing. So far, therefore, as there may be conflict between liens, there is no obscurity, for as to them it is only necessary to inquire which is the first in the order of time." Again, at page 569, it is said: "An unrecorded mortgage is in no sense a secret lien, nor indeed any lien at all until it is recorded. Up to that time it is precisely as if it had no existence, invalid and unknown to the creditor."

This language settles any controversy as between judgments, no matter what the date of the demands upon which they are obtained, and mortgages recorded after the entry of the judgments, upon the ground that the lien first obtained is prior; and the rule is the same when the mortgage is recorded after the lapse of time provided in the registry act of 1876, *supra*, if the holders of the judgments had no notice of the mortgage when their liens were acquired. If judgments obtained under such circumstances have precedence over mortgages recorded after time, they certainly would have precedence over a mortgage which has never been recorded.

For the reasons above given, it is ordered and decreed, that the report of the referee, as to the order of payments and distri-

bution of the proceeds of sale to be herein ordered, be confirmed and made the judgment of this court. \* \* \*

*Mr. H. J. Haynsworth*, for appellants.

*Messrs. Walter Hazard and Richard Dozier*, contra.

February 1, 1888. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The action below was primarily for the partition of the real estate of one McG. Carraway, late of Georgetown County, among his heirs at law. The case was referred to a special referee, under an order requiring him, among other things, to report what *liens* existed upon the lands, with their character and priority. Quite a number of liens were established against his heirs at law, one or more, to wit:

1. A mortgage of James F. Carraway, Sidney F. Carraway, McG. Carraway, and Elizabeth Green, to M. J. Hirsch, March 20, 1885, to secure their bond for \$900. *This mortgage was never recorded.*

2. A judgment in favor of one Mills against James F. Carraway and John G. Carraway, as Carraway & Bro., for \$378.27, dated May 14, 1885.

3. Judgment in favor of Congdon, Hazard & Co. against James F. Carraway, jr., and John G. Carraway, as Carraway & Bro., for \$2,340.16, dated November 20, 1885.

4. A judgment of H. Kaminski & Co. against James F. Carraway, John G. Carraway, McG. Carraway, S. F. Carraway, and Elizabeth Green, for \$2,114.10, dated November 20, 1885.

5. A judgment of Congdon, Hazard & Co. against James F. Carraway, jr., and John G. Carraway, as Carraway & Bro., for \$430.70, dated November 20, 1885.

6. A judgment of Congdon, Hazard & Co. against McG. Carraway for \$168.70, dated November 20, 1885.

7. A judgment of Congdon, Hazard & Co. against McG. Carraway, jr., for \$940.05, dated November 20, 1885.

All of these judgments were obtained, as reported by the referee, upon debts contracted before the execution of the mortgage of Hirsch, of which mortgage, however, none of the credi-

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tors had notice until June, 1886. The referee held that said judgments were entitled to priority over the Hirsch mortgage. This holding by the referee was affirmed by his honor, Judge Wallace, who heard the case upon exceptions to the referee's report. From this decree Hirsch now appeals upon the following exceptions: "I. Because his honor erred in holding that creditors whose debts were contracted before the execution of the Hirsch mortgage and reduced to judgment after its execution, were subsequent creditors within the meaning of the registry acts. II. Because his honor erred in holding that an unrecorded mortgage of real estate is postponed under the registry acts to a debt contracted before the execution of the mortgage and reduced to judgment after its execution without notice. III. Because his honor erred in holding that the judgments were liens upon the respective interests of the judgment debtors in said real estate prior to that of the mortgage of M. J. Hirsch," &c.

It will be observed that these exceptions, though three in number, and separately stated, raise substantially the same legal question, which is the only question in the case, to wit: whether a judgment obtained on a debt contracted before the execution of an unrecorded mortgage, obtained after the mortgage, and without notice thereof, is entitled to priority over said mortgage.

Inasmuch as this question must be determined by the registry act of 1876, now embodied in section 1776 of the General Statutes, in which the act of 1843 was substantially re-enacted, we do not conceive it to be necessary to consider very fully the numerous decisions of our court under the registration laws of force prior to 1843. There is some apparent conflict in these decisions which it might be difficult to reconcile, and some dissatisfaction expressed with the principle established, but we do not find that it has been at any time held in this State, that an unrecorded mortgage is void as between the parties thereto. On the contrary, a mortgage properly executed has been always held valid as between the parties and all others having knowledge of its execution, whether recorded or not. And in several cases the very question involved here, to wit: whether a subsequently entered judgment should take priority over an unrecorded mortgage was adjudged adversely to the judgment. See *Ash v. Ash*,

1 Bay, 306; *Smith & Ravenel v. Smith*, 1 *McCord Ch.*, 148; *Barnwell v. Porteus*, 2 *Hill Ch.*, 221; *Steele v. Mansell*, 6 *Rich.*, 442; *Ashe v. Livingston*, 2 Bay, 80.

A mortgage, then, being valid between the parties, and having a lien upon the land embraced therein, capable of being enforced even against a subsequently entered judgment, whether recorded or not, up to the act of 1843 (now section 1776 of General Statutes), the question arises, has any change been made in this respect by said subsequent acts, 1843, and section 1776 of General Statutes? Section 1776 of General Statutes is substantially, as we have said, a re-enactment of the act of 1843, with some amendment. We need, then, go no further back than this section. It provides: "That all deeds of conveyance of land, all deeds of trust, &c., all mortgages or instruments in writing in the nature of mortgages of any property, real or personal, \* \* \* shall be valid so as to affect, from the time of such delivery or execution, the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery and execution," &c.

Now, what is the meaning and intent of this section? This does not seem to us to be at all doubtful or uncertain. It means precisely what the language in which it is couched indicates and declares. And it declares that the instruments mentioned, if unrecorded within forty days after delivery or execution, shall be void as to subsequent creditors and purchasers. To this extent it goes, and no further. It does not require them to be recorded to make them valid generally, but it impliedly admits their general validity, with the exception that as to certain parties, to wit, subsequent creditors and purchasers without notice, they shall be invalid unless recorded within the prescribed time. In other words, that all such papers are valid and binding, having all the effect which they purport to have, with the proviso, that they shall not have such effect as to subsequent creditors and purchasers without notice, unless recorded as required by the act.

This, then, being the only interpretation of which the act seems to be susceptible, the matter before us is resolved into the question, whether or not the judgment creditors herein are subsequent creditors. It is admitted that the debts upon which the

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judgments were obtained were, each and all, contracted before the execution of the Hirsch mortgage. It cannot be said, then, that they were subsequent creditors, unless the entry of the judgments made them creditors, which will hardly be claimed. A judgment is the determination of one's rights upon a cause of action which existed before the adjudication, and although obtained after the cause of action arose, it reflects back and establishes the right as of the date of its inception, and having established such right, it affords the means of enforcing redress for the violation thereof. A judgment, therefore, obtained after the execution of a mortgage upon a debt contracted before its execution, cannot be said to be a subsequent debt, in the sense of the language of the act.

Does it come within the intent or spirit of the act? The plain purpose of the act of 1843, as was said by Chancellor Carroll in *Williams v. Beard* (1 S. C., 313), Circuit decision, "was to guard against loss and injury to subsequent creditors and purchasers from their dealing with the mortgagor, under the delusion that he retained the absolute and unencumbered ownership of the property mortgaged." This purpose had no reference to existing creditors, nor did the act intend to interfere in any way with the right of a debtor to lawfully incumber his property for the payment of his debts, or with the view to raise money as against existing creditors. All of the judgment creditors here were existing creditors at the time the Hirsch mortgage was executed and delivered, and we cannot see how that mortgage can be defeated, unless it is vulnerable upon grounds other than that it was not recorded within the forty days prescribed by the act. The judgment creditors here not being subsequent creditors, either in the sense of the terms used in the act, or in its purpose or intent, we think it was error on the part of the Circuit Judge to give priority to the judgments in question.

It may be true that it would be promotive of the interests of commerce, and of the safe and uncomplicated sale and transfer of property, that all liens and transfers should be spread upon some public record, or else to be absolutely void, but we do not think that it is within the province of the judiciary to enact such a law. On the contrary, we must follow the law as established and



enacted by the legislative department of the State. We think the recent registry act of 1876, General Statutes, section 1776, is the act which governs the question involved here, and from our interpretation, given above, we think the conclusion is inevitable, that the failure to record a mortgage affects its validity only as to subsequent creditors and purchasers, such being in the terms of the act the only class that can invoke the penalty for non-record imposed therein. It would have been very easy for the general assembly, if it had intended to place subsisting creditors upon the same plane with subsequent ones, to have said so. A very slight alteration of the phraseology of the act would have accomplished this end. This, however, was not done; on the contrary, a special class was mentioned, to whom, it seems, the benefit of the act was confined. *Expressio unius, exclusio alterius*.

The case of *King v. Fraser* (23 S. C., 543), has no application to the case here. In that case the mortgage had been recorded out of time, and certain debts had been contracted by the mortgagor after the execution of the mortgage and before it had been recorded, and the question before the court was, whether the mortgage took precedence to these debts, which had not been reduced to judgment. This question depended upon the construction of the proviso to the act of 1876, General Statutes, section 1776, which enacted as follows: "Provided, nevertheless, that the above mentioned deeds or instruments in writing, if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record, &c." The court held that the mortgage having been recorded, although out of time, yet under this proviso which authorized the record, it took rank from the date of the recording, and being the oldest, and in fact the only, lien upon the land, the creditors not having in the mean time reduced their claims to judgment, it necessarily had priority. Otherwise the anomaly would have been presented, of unsecured claims, having no lien whatever, defeating a lien which the proviso had declared should exist and become valid from date of recording. This proviso, however, is not involved in the case before the

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court. This case turns upon the body of the act, in which subsequent creditors and purchasers for a valuable consideration without notice are given priority over an unrecorded mortgage, and a mortgage not recorded within the forty days. And the sole question, as it seems to us, is, are the creditors here *subsequent creditors* for a valuable consideration without notice? We have seen that they are not such subsequent creditors, and therefore are not entitled to priority.

Nor does *Piester v. Piester* (22 S. C., 144), affect this case. There Mr. Justice McIver drew the proper distinction when he said: "The necessary effect of this declaration is, that an unrecorded mortgage is void, is in fact not a mortgage, wherever the effect of so regarding it would be to affect the rights of a subsequent creditor without notice"—thus limiting its invalidity to the claims of subsequent creditors, but sustaining it as to all others.

Prior to the act of 1843 the registry laws of the State, both as to deeds of conveyance and mortgages, were found in the acts of 1698 and 1785. While these acts were the only acts of force on this subject, the cases of *Ash v. Ash*, 1 Bay, 306; *Smith v. Smith*, 1 McCord, 148, and *Barnwell v. Porteus*, 2 Hill Ch., 221, *supra*, were heard and determined, in which the principle that an unrecorded mortgage had priority over a subsequently entered judgment was established and recognized; and this, too, as it seems, whether the judgment was founded upon a subsequently contracted debt or not. This doctrine, although established and adhered to, seems not to have been entirely satisfactory, and no doubt the act of 1843, which has reference to mortgages alone, was enacted in part to remove this dissatisfaction, by relieving subsequent creditors and purchasers from the difficulties surrounding them in consequence of these decisions. The act of 1843 thus made plain the registry law as to mortgages. Deeds and absolute conveyances of land were, however, left under the operation of the acts of 1698 and 1785, under which the old Court of Errors had decided in *Steele v. Mansell* (6 Rich., 438), that an absolute deed never recorded was not void, but was still good between the parties, and if recorded, though after the time, it was notice to the world from the date of the registry—thus establishing a different rule from that applied to mortgages.

Subsequent to this, and no doubt with the view to harmonize the registry laws including conveyances and mortgages and all instruments in writing requiring recording, the act of 1876 was passed, with the proviso referred to above; which declares that all instruments in writing required to be recorded, shall be valid so as to affect subsequent creditors or purchasers only when recorded within forty days. Provided, nevertheless, that said mentioned deeds or instruments, if recorded subsequent to the expiration of the said forty days, shall be valid only from the date of the record—thus legalizing the recording of all papers required to be recorded, even after the forty days specified, and giving them rank from the date of the record as to all parties, including subsequent creditors and purchasers. This act of 1876, General Statutes, section 1776, now furnishes the registration law of this State, and while it clearly declares void all unrecorded conveyances and mortgages, as to subsequent creditors and purchasers for a valuable consideration without notice, yet there is nothing in it which declares such papers void as between the parties or as to subsisting creditors, like those contesting the validity of the mortgage herein.

It is the judgment of this court, that the judgment of the Circuit Court be reversed, and that the case be remanded to be adjudged and determined in accordance with the principles above announced, giving the Hirsch mortgage priority over the judgments mentioned.

MR. JUSTICE McIVER concurred.

MR. JUSTICE MCGOWAN, *dissenting*. The single question in the case is whether a judgment recovered on a debt older than an unrecorded mortgage without notice, has priority over the mortgage though subsequent in date. It is manifest that this must be determined by the force and effect of the law as to registry. It has frequently been said, and certainly with great truth, that our registry law, before the act of 1843, concerning mortgages “was lamentably obscure and deficient,” and we may add, especially upon the very point now made. The registry laws naturally embrace only deeds, conveyances, and such other instruments as can only be known to the world by recording, while a

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judgment, which has a lien as well as a mortgage, is already of record and needs no further recording. It seems to me probable that this natural omission in the registry law of all reference to judgment creditors, has led to the effort to exclude them from the protection given to other subsequent incumbrancers without notice, and while ignoring altogether the judgments, to remit them back to the condition of simple subsisting creditors for whose protection no special provision is made by the registry law.

In *Ash v. Ash* (1 Bay, 306), as early as 1793, it was held, in reference to a mortgage which had been mislaid and on that account had not been recorded, "that the plaintiff's mortgage had not lost its lien by the entering up of subsequent judgments. The mortgage was not void by not being on record," &c. This decision was followed by a series of cases, but we think it may be truly said that it was never satisfactory to the bench or the bar of the State. In *Smith & Ravenel v. Smith*, 1 McCord Ch., 148 (1825), Judge Nott said: "I must confess I have never been perfectly satisfied with that decision. [*Ash v. Ash*.] But it has been received as law and acted upon for upwards of thirty years, and ought not to be questioned." In *Barnwell v. Porteus*, 2 Hill Ch., 221 (1835), Judge Evans, sitting for Chancellor Harper, said: "If this were now a new question, I should have great difficulty in making up my opinion, but I am relieved by former adjudications from any difficulty on the point," &c.

And in *Steele v. Mansell*, 6 Rich., 442 (1852), where, after great argument and much deliberation, the old Court of Errors was divided, Judge Wardlaw, who delivered the opinion of the majority of the court, said: "In vain may it now be shown that *Ash v. Ash*, and other cases out of which the rule grew, were decided altogether in reference to the act of 1698, at places where and at times when the act of 1785 was not considered to be of force. However introduced, the rule, ever since 1799, has been acted on." And at another place, "It may be that this was not a correct construction of the section, and that it would have been better to hold that a judgment entered is like a mortgage recorded, and by the section an unregistered deed is made ineffective to withstand the lien of the judgment, which attaches as if there was no such deed, unless notice of it has come to the

creditor from change of possession or other circumstances," &c.

The registry laws of the State and the decisions under them were in this very doubtful condition when the legislature passed the act of 1843, in reference to mortgages, and followed it up by the act of 1876, as to "all instruments in writing required by law to be recorded." This act, now embodied in section 1776 of the General Statutes, substantially re-enacted that of 1843, with certain additions, expressly repealed all former laws "inconsistent with it," and, as we suppose, was intended to be a system of registry, superseding all other laws upon the subject. See *Williams v. Beard*, 1 S. C., 322. If in this we are correct, we need not perplex ourselves with the confusion and inconsistencies which existed under the old law, but address ourselves to the effort to give proper construction to the new, availing ourselves, of course, of all the light afforded by the former.

What, then, is the proper interpretation of the act of 1876 upon the point, whether a subsequent judgment creditor without notice has priority over a mortgage which was never recorded? The provision is as follows: "All deeds of conveyance of land, all deeds of trust, &c., all mortgages or instruments in writing in the nature of a mortgage of any property real or personal \* \* \* and generally all instruments in writing now required by law to be recorded, &c., delivered or executed, &c., shall be valid so as to affect, from the time of such delivery or execution, the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery and execution, &c., &c. Provided, nevertheless, that the above mentioned deeds or instruments in writing, if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice, only from the date of such record."

In giving interpretation to the act we can derive little assistance from decided cases, for since its passage no case has arisen involving the very point. The case of *McNamee & Co. v. Huckabee* (20 S. C., 190), was upon the question of priority between two absolute deeds, both of which were recorded out of time; and the case of *King v. Fraser*, recently decided, was in reference to

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the effect of a mortgage recorded out of time, upon the unsecured debts of the mortgagor, contracted between the date and the registry of the mortgage. There was no question in it as to the effect of a subsequent judgment as against a mortgage that was never recorded. That question is now before us for the first time under the act of 1876. Considering all the parts of the act together as making a system of registry, it seems to me that three things are manifest: first, that all the kinds of instruments mentioned, including mortgages, are required to be recorded; second, that if recorded within forty days, they shall be valid from their date, but if not recorded within that time, they shall be valid only from the date of said record; and, third, as a necessary consequence of the foregoing, that if not recorded at all, they shall never be valid. As was said by Mr. Justice McIver in *Piester v. Piester* (22 S. C., 146): "The necessary effect of this declaration is, that an unrecorded mortgage is void—is in fact not a mortgage—whenever the effect of so regarding it would be to affect the rights of a subsequent creditor without notice."

So far, then, there is no difficulty. But, notwithstanding this evidence of the spirit of the act, in the strong penalty imposed for not recording, it is urged that this refers only to subsequent creditors, and that all others are left precisely in the same condition they would have occupied if there never had been a registry law; and, therefore, if a creditor of that class recovers a judgment against his debtor, that judgment must still retain the character of a subsisting debt, and cannot become a subsequent incumbrance, and entitled to protection as such. The act certainly does not say any such thing, and in view of its manifest object, we do not feel authorized to make that inference merely from its silence upon the subject. It seems to me that this view overlooks the fact that all mortgages are required to be recorded; that, in the interest of fair dealing, registry is the settled policy of the State. A mortgagee who does not record his mortgage surely disregards the law—puts it in the power of the mortgagor to impose on others, and subjects himself to dangers which are not confined to subsequent creditors, but may as well grow out of the class of subsisting creditors. Indeed, I could never perceive any great difference between subsisting and subsequent credi-

tors, as to a mortgage which was never recorded, and of which neither had notice—the property never changing hands, but all the while remaining in the possession of the debtor, and to all appearance unincumbered. The simple fact is, that neither knows that there is a mortgage, and both trust upon faith, that the property is as the record shows it.

It is true that a mortgage is good between the parties, although not recorded. They have notice, and, of course, the registry act does not apply to them, but was meant for other creditors. If a subsisting creditor without notice obtain a second mortgage which he records, can there be a doubt that he would be entitled to precedence over an unrecorded mortgage? *Williams v. Beard, supra*. If he obtain an absolute conveyance, he would also have precedence; and that, too, if the sale were made by the sheriff under a judgment recovered on a subsisting debt, and the judgment creditor himself becomes the purchaser. This is clearly put by Chancellor Inglis in *McKnight v. Gordon* (13 Rich. Eq., 249), where he says: "In *Barnwell v. Porteus, supra*, the execution under which the land was sold had been lodged on a judgment entered after the execution of the mortgage, and the debt, which had been the cause of action therein, had been contracted before the making of the mortgage. It was expressly decided that the *fi. fa.* in the sheriff's hands against the mortgagor conferred upon the officer no power and authority to levy upon and sell the whole absolute estate in the lands. Yet the purchaser, although he was himself the creditor, was permitted, as a purchaser who had first recorded his deed, to hold against and over the mortgage," &c.

That is to say, if Congdon, Hazard & Co. had actually forced a sale, and become the purchasers and recorded the sheriff's deed, their title would have been good against and over the mortgage. This most conclusively shows that under the old law the creditor, by obtaining judgment, ceased to be merely a subsisting creditor, and therefore the principal reason why the law as it then stood, did not protect the judgment itself before actual sale under it, must have been the circumstance that it was not like a mortgage, regularly recorded or capable of record in the register's office. Now that we are endeavoring to give construction to the

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new registry law so as to make it uniform and symmetrical, and are not embarrassed by the conflicting interpretations of the old, we hesitate to adopt a distinction which seems technical and shadowy, was never satisfactory, and which caused, and if followed will continue to cause, great confusion and injustice.

It was soon perceived that so far as the rights of the delinquent mortgagee were concerned, there was small difference between a judgment lien with the power to sell, and an actual sale and purchase under it. In *Freeman on Judgments*, section 366, the author says: "The purchaser at a sale under a judgment is, to the same extent as if he were purchaser at a private or voluntary sale, protected from claims previously acquired by third persons from the judgment debtor, of which he had no actual or constructive notice. \* \* \* In some of the United States, however, the registry laws so modify the effect of conveyances and other instruments concerning real estate, as to give a judgment lien precedence over any unrecorded instrument, of which the judgment creditors had no knowledge at the date of the attaching of the lien of his judgment; and the holder of the lien takes all the title the records show to be in the judgment debtor," &c. And in a note the learned author says: "The tendency of the recent statutes and the decisions interpreting them, is to give a judgment lien precedence over a prior unregistered conveyance or encumbrance, especially if a plaintiff have no notice of it when his judgment was docketed or registered, or the levy of his writ made"—citing numerous authorities from Texas, Alabama, Georgia, Virginia, West Virginia, and Illinois.

A judgment is, for most purposes, to be regarded as a new debt, and this new debt is not in general affected by the character of the old one. *Freeman*, section 217. It is itself a thing of record, and has a lien from its date without further recording; and, in view of the spirit and scope of the act of 1876, and to promote its declared policy of enforcing registry by penalties upon those who disregard its provisions, it seems to me that a subsequent judgment without notice should be held to be what it really and substantially is—a subsequent encumbrance in the sense of the act, or, in the words of Judge Wardlaw, "that a judgment entered is like a mortgage recorded," and as such



entitled to the protection afforded by the act. This precise point was touched but not decided in *Boyce v. Shiver* (3 S. C., 520), in which Judge Glover said: "I apprehend no case can be found since the passage of the act of 1843, where a mortgage not recorded within the prescribed time, has been held to be a preferred lien against a subsequent judgment creditor without notice."

The whole policy of our law is against secret liens of every kind and form. It was in this view that our courts discarded the old English doctrine of the lien of the vendor. See *Herring & Co. v. Cannon* (21 S. C., 217), citing, among others, the case of *McCorkle v. Montgomery*, 11 Rich. Eq., 132, in which Chancellor Dunkin said: "Upon this subject the language of Chief Justice Marshall in *Bayley v. Greenleaf* (7 Wheat., 46) is instructive: To the world, says he, 'the vendee appears to hold the estate, divested of any trust whatever, and credit is given him in the confidence that the property is his own in equity as well as in law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of the estate, on which he claims a secret lien. It would seem inconsistent with the principles of equity and with the general spirit of our laws that such a lien should be set up in a Court of Chancery, to the exclusion of *bona fide* creditors.' It may be added" (says Chancellor Dunkin) "that the act of 1843, requiring all mortgages of real estate, however formal and perfect, to be recorded within sixty [now forty] days, may be regarded as a legislative declaration of the prohibitory policy of the country against any such secret liens." And Chief Justice Moses, in *Boyce v. Shiver*, *supra*, well said: "So far from any disposition to extend the provisions now existing by law, in favor of secret liens, we feel that the highest considerations of public policy require that they should be held within their prescribed bounds. There is not a single modern writer, whose opinion carries weight, who does not regret that the courts ever favored the introduction of secret liens on property, and many of the most eminent judges of England, while they felt bound from precedent and authority to sustain them, denied the wisdom and policy of the rule which

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permitted them; and but few judges in our country, whilst also following the authority of names which preceded their own, have failed to declare their determination not to extend them beyond the limits to which they have been carried," &c.

I think the judgment below should be affirmed.

Judgment reversed.<sup>1</sup>

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SMITH v. WINN.

1. Findings of fact by referee and Circuit Judge, approved.
2. The will directed that testator's property should be appraised and divided by the executors "hereinafter named," amongst his wife and children, and nominated three persons as executors, only one of whom qualified. *Held*, that the power was not a personal confidence, but was conferred upon the executors *virtute officii* and was coupled with a trust in favor of third persons, and therefore might be validly executed by the sole qualified executor.
3. The adult distributees, including a married woman and her trustee, are bound by a partition and division made by the executrix, in which they acquiesced and under which they received portions.

Before FRASER, J., Union, October, 1886.

In this case, Hon. Joseph B. Kershaw, Judge of the Fifth Circuit, sat in the place of the Chief Justice, who had been of counsel in the cause. It was an action by Asa Smith, trustee of Janie E. Smith, and by Janie E. Smith and her husband, William, against the executors and distributees of William Long, deceased. Mrs. Smith was married prior to April, 1868, and her estate was transferred to Asa Smith as her trustee in April, 1869.

The case was referred to David Johnson, jr., Esq., as special referee, who after giving his reasons, reported the following conclusions:

I find as conclusions of fact: 1. That the appraisement of the estate of Wm. Long, made on March 21, 1868, was made in good

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<sup>1</sup> This completes the cases of April Term, 1887.—REPORTER.

faith, was fair and just. 2. That the partition made under the appraisement last mentioned was with the consent and approval of all the adult legatees. 3. That Mrs. Jane E. Smith consented to and approved said appraisement and partition at the time, and ratified and confirmed it after the adoption of the constitution of 1868. 4. That the accounts, "X" and "Y," herewith filed, are proper statements of the accounts of the executors with the estate of their testator, and with the several legatees, except as to the rents and profits of the Darwin land, and the proceeds of the sale of the Sanders bale of cotton, as to both of which the referee finds nothing.

I find as conclusions of law :

That the partition of the estate of Wm. Long, with the appraisement of March 21, 1868, as a basis of values, is valid and binding upon the parties to this action, except Caroline and Thomas E., children of John Long, deceased, and that it is valid and binding as to the said Caroline and Thomas E., except as to the assignment of the Darwin land to them. That Asa Smith, as trustee, and Jane E. Smith, are estopped from calling the validity of the said appraisement and partition in question.

That the executors are creditors of the estate, upon their general account therewith, to the amount of one hundred and 38-100 dollars. That the executors are indebted to Mary Winn, Nancy Ray, and to Caroline and Thomas E., children of John Long, deceased, as stated in exhibit "Y," and that the said parties are respectively entitled to judgment for said sums. That Asa Smith, as trustee of Jane E. Smith, James Long, Charles R. Long, Mrs. A. C. C. Hames, and Miss Sallie Long, are respectively indebted to the executors as stated in exhibit "Y," and that the executors are entitled to judgments against said parties for the amount due by each of them respectively.

That the balances due by the legatees respectively to the executors as above stated, should be made a charge upon their respective shares of the estates yet to be distributed, and that no further payments should be made to said parties until said balances are satisfied. That before any further distribution is made, the legatees should be charged respectively with the amounts received by them from Mrs. Miriam Long in her life-time, with interest from

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the day of her death. That the executors should account for the rents and profits of the Darwin land during the time it has been in their possession, and for the proceeds of the Sanders bale of cotton. That Caroline Davis and Thos. E. Long should be charged with the rent of the Darwin land, which was received by C. C. Davis, their guardian.

The referee respectfully recommends: That this action be retained until the conclusion of the action now pending to try the title to the Darwin land. That the personal property allotted to Mrs. Miriam Long from the estate of Wm. Long, be sold by the executors after proper advertisement, for cash. That the real estate which was allotted to Mrs. Long, as aforesaid, be sold by the master for Union County, upon some convenient sales-day, upon the following terms, &c.

Upon exceptions by both parties to this report, the cause came on to be heard by Judge Fraser, who filed the following decree:

The most important question raised by the exceptions is, as to the validity of a partition of the estate of the testator by Mary Winn, the only qualified executor, and her husband, the other two persons named in the will as executors having declined to qualify or to become trustees of the shares of the daughters. An examination of the will shows that the power and duty of dividing this estate was given to the executors, and as a part of their duty as such, and in a clause in which they are not named at all, except that they are referred to as "hereinafter named." "Where authority is given to executors, and the will does not expressly point to a joint exercise of it, even a single surviving executor may exercise it"—*Sugden on Powers*, 128—and the liberality of modern times will probably incline the courts to hold that in every case where the power is given to *executors*, as the office survives, so may the power. *Ibid.* I have not the authorities at hand, but take it to be law, that wherever a power of sale or other power merely administrative is given to executors as such, the power not only survives, but may be executed by those, even if only one, who qualify and assume the duty of executing the will.

The case of *Mallet v. Smith* (6 *Rich. Eq.*), as I understand the case, is not to the point, as there the power was one given in "special trust and confidence," and in no way connected with the exe-

utorship. It was a power, as I remember it, to appoint *to whom*, in certain contingencies, the estate should go, and not a mere power to administer, as to pay debts, sell and invest, all of which could be enforced, or even exercised by the courts—it was a personal trust. The power given in the will in *Mallet v. Smith* is one which no court could enforce or exercise any authority to compel the depositary of the power to execute otherwise than in some way agreeable to his own will and discretion.

I concur with the referee in the conclusion, that the first appraisalment was not made with a view to a partition. If, however, it was, the executrix was not bound to act on it. The will requires the valuation on a specie basis, and such seems to have been adopted at the second appraisalment, upon which the division was made. I conclude, therefore, for these reasons, as well as those assigned by the referee, that the division of this estate, made in 1868, was binding on all the parties, whether married women or minors or trustees or guardians.

I do not find in the papers before me sufficient data to show how much of the *corpus* of the estate has been paid to Mrs. Smith, but no interest on any part of the trust fund should be paid to her until, out of the interest, so much of his *corpus* is restored as has been paid to her.

It does not appear why the referee has not allowed Mrs. Winn commissions, and nothing appears on the face of the papers before me to deprive her of them.

It is ordered and adjudged, that the reports of the referee above referred to, be and they are hereby confirmed and made the judgment of the court, except as hereinafter provided.

It is ordered, that the executors do pay into court the full amount of the *corpus* of the trust estate of Mrs. Smith, which has not heretofore been paid to the trustee, Asa Smith, including the amount of the *corpus* paid or loaned to Mrs. Smith, the beneficiary, and that no portion of the interest on the trust fund so paid into court, or now in the hands of her trustee, Asa Smith, be paid to Mrs. Smith, until out of said interest the whole amount of the *corpus* to be paid over by the executors under this order be refunded to them, and which interest the said trustee shall pay to them for this purpose. It is ordered, that it be referred

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to David Johnson, jr., as referee, to ascertain, on the basis of the accounting herein confirmed, what is the amount of such *corpus*.

It is ordered, if it shall hereafter appear that commissions should have been allowed, that the statement of the accounts herein confirmed be corrected as the allowance to said commissions may render necessary and proper, and it is referred to the same referee, to report such facts as will enable the courts to determine this matter.

It is further ordered, that all matters between the minors and the other parties to this action, *arising out of the alleged defect in title* to the land assigned to them in the partition, be reserved, as for future determination, as well as the modifications which may thereby be made of the rights of the other parties as amongst themselves.

Several of the exceptions are taken to the amounts found due, one way or the other, in the reports, without pointing out the specific errors in such a way as to direct the attention of the court to them, and which I am therefore unable to detect.

It is ordered, that all matters of costs and any others not herein adjudicated, be reserved for the future order of the court, and that parties have leave to apply for such administrative order as may be proper to carry out this judgment.

Plaintiffs appealed upon the following exceptions :

1. For that his honor finds that the first appraisalment was not made with a view to partition; whereas his honor should have found the reverse.

2. For that his honor erred in holding that the executrix had authority under the will to exercise the power of making partition; and in not holding the contrary.

3. For that his honor erred in holding that the division of the estate, made on March 21, 1868, was binding on all the parties, whether married women or minors, or trustees or guardians; and in not holding to the contrary.

4. For that his honor erred in adjudging that the reports of the referee be confirmed and made the judgment of the court; whereas his honor should have overruled said reports in the particulars set forth in the exceptions of the plaintiffs to said reports.

5. For that his honor erred in not finding that no commissions should be allowed to the executrix.

*Mr. I. G. McKissick* read argument of *J. H. Rion*, deceased, for appellants.

*Mr. D. A. Townsend*, contra.

December 12, 1887. The opinion of the court was delivered by

MR. JUSTICE KERSHAW. On April 6, 1865, William Long, the elder, duly executed his last will and testament, whereby he appointed the defendant, Mary Winn (then Mary Long), James B. Steedman, and his son, William Long, executors. Soon thereafter, and in the same year, he died, and his will was admitted to probate. Mary Long alone qualified as executrix thereof.

The will, among other things, contained the following provision: "It is my will and desire, and I do hereby direct the whole" (that is, the residue of his estate) "shall be appraised and divided by my executors, hereinafter named, into two equal shares or portions; one of which, and that one which my said wife shall choose or select, I give, devise, and bequeath to my said wife, to have, use, and possess, during the term of her natural life or widowhood, and from and after her death I give, devise, and bequeath the same to my children and their representatives, subject to the terms and conditions hereinafter prescribed." The other half he directed to be divided into nine equal parts, and gave one part to each of his children by name, then alive, and the other to be equally divided between the two children of a deceased son, to be held for life, with remainders over. The will also provides that "in estimating and appraising the value of my estate, I direct that a specie basis shall be used, or such value put upon my property as it would have borne in the year of our Lord one thousand eight hundred and sixty."

The executrix, in the language of the referee's report, "appears to have acted with the most exemplary good faith, and to have been actuated by a desire to do every one of the legatees equal and exact justice. No step, however unimportant, appears to

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have been taken without the consent and approval of all the parties in interest who were of age to consent, or without the advice of skilful and able counsel." In December, 1865, the executrix called in four neighbors and had an inventory and appraisement of the estate made and filed in the office of the ordinary. No attempt was made then to divide the property, but by agreement of the adult legatees it was kept together and planted for the common benefit. In August, 1867, the legatees agreed in writing "to divide the estate" according to the will. This agreement was signed by all the adult legatees, and the instrument proceeded: "Owing to the unsettled condition of the country and the probability of confiscation, we agree to rent that portion of the land belonging to the children and divide the proceeds at the end of each year," &c.

On March 21, 1868, the property was appraised for the purpose of making a partition as directed by the will, the appraisers having been appointed by the ordinary, and acting under his warrant. They were three of the former appraisers. On the same day five of the adult legatees signed a written guaranty, "faithfully, honestly, pecuniarily, and everything to a cent of property, to support the executors of the above deceased, in any difficulty in land that she may become engaged in hereafter concerning the estate. This, in consideration that they do not charge any commission on the estate." Among the signers of this guaranty was Janie E. Smith, the plaintiff, and the *cestui que trust* of Asa Smith, plaintiff. All the legatees who were of age had full notice of these proceedings and consented to and approved of them and received portions under the partition made, including Mrs. Jane Smith and Asa Smith, her trustee.

The referee and the Circuit Judge have concurred in the facts found, and this court can perceive nothing in the case that would justify any interference with their conclusions. For the purposes of this opinion, they need not be further recited in this place.

The principal question of law raised by the appeal concerns the power of the executrix to make the appraisement and partition of the estate, now sought to be set aside. Had she authority alone to execute the power conferred upon the executors to appraise and divide the estate? If it was a mere naked authority



given to several persons, all must act. 4 *Kent*, 325; *Mallet v. Smith*, 6 *Rich. Eq.*, 22, 60 *A. D.*, 107. So if it indicates a personal confidence in the persons named, and the word executors is merely a designation or title. *Mallet v. Smith*. The ground of the power being personal confidence, it is *prima facie* limited to the persons named, and will not survive without express words. *Cole v. Wade*, 16 *Ves.*, 27. If, however, the power be conferred upon executors as such, without naming those holding that office, and there is nothing to show that it is a personal trust, the execution of the power appertains to the office of executor, and may be performed by the person holding the position, if the execution of the power be necessary in order to carry into effect the will of the testator. *Jackson v. Ferris*, 15 *Johns.*, 347; *DeSaussure v. Lyons*, 9 *S. C.*, 496, 501; *Forbes v. Peacock*, 11 *Mees. & W.*, 686; *Sugden on Powers*, 139.

If it be a power coupled with a trust, it survives and may be executed by one executor where the others die or renounce the office. The test of such a power being coupled with a trust, is that a third party has such an interest as will enable him to call on the executors to execute the trust. *Jackson v. Given*, 16 *Johns.*, 168; *Franklin v. Osgood*, 14 *Johns.*, 527, 553; *Caines Cases*, 15; *Taylor v. Benham*, 5 *How.*, 266; *Peter v. Beverly*, 10 *Peters*, 532. It cannot be doubted that the power in this case was one coupled with a trust and to be executed by the executors *virtute officii*, and necessary to be put into exercise in order to execute the provisions of the will. Hence it was properly executed by the only person who qualified as executor.

As to the manner in which the power was executed in 1868, we find nothing to question. The provisions of the will were carried out in the most reasonable and discreet manner. All the adult parties approved of it and participated in its results. They have acquiesced in it for a number of years and could not now complain if any irregularities in the proceedings had been shown to exist. The plaintiffs, especially, are estopped to deny the validity of the transaction by their conduct in connection with it.

Nothing was decided by the Circuit Court in regard to the claim for commissions by the executrix. It was made the subject of a reference in order to ascertain the facts in regard to it.

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It is not necessary to say anything in regard to the other matters discussed on the appeal. It is sufficient to say that we concur upon those points with the court below for the reasons appearing in the Circuit decree and the excellent report of the referee.

The judgment of the court is, that the judgment of the Circuit Court be affirmed, and that the case be remanded to the Circuit Court for such further proceedings as may be necessary to carry out the judgment of that court.

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STATE v. PRATER.

1. An appeal from the sentence (which is the judgment) in a criminal case, does not operate as a *supersedeas* of the judgment, but only as a stay of its execution. When the judgment appealed from is affirmed, and the *remittitur* is filed in the Circuit Court, it then becomes the duty of that court to assign a new day for the execution, if meantime the day originally fixed for the execution has passed.
2. It may be necessary for the Circuit Court to adopt as its own a judgment as modified by the Supreme Court, but where the judgment of the Circuit Court is affirmed on appeal, such judgment stands as of its original entry without further order on Circuit.

Before FRASER, J., Orangeburg, May, 1887.

The opinion states the case.

*Messrs. M. I. Browning and T. M. Raysor*, for appellant.

*Messrs. Jervey*, solicitor, and *Izlar & Glaze*, contra.

January 4, 1888. The opinion of the court was delivered by MR. JUSTICE McIVER. During the May term of the Court of Sessions for Orangeburg County in the year 1886, the appellant was convicted of murder and sentenced to be hanged on July 2, 1886. From this judgment an appeal was taken to the Supreme Court and on February 28, 1887, this court rendered its decision as follows: "The judgment of this court is, that the judgment of the Circuit Court be affirmed"; and in accordance

therewith the *remittitur* was duly sent down and filed in the Circuit Court. At the May term of the Court of Sessions for Orangeburg County in the year 1887, the prisoner was put to the bar, and after reciting the previous proceedings, in the usual form, execution of the sentence previously imposed was awarded and the same was directed to be carried into effect on June 3, 1887. The defendant appeals upon the following grounds: "1. Because there was no authority of law for the said sentence and award of execution. 2. Because there was nothing in the judgment of, or in the *remittitur* from, the Supreme Court to the Circuit Court directing or authorizing said sentence or award of execution."

As we gather from the argument here the real point intended to be made by these grounds of appeal is, that the appeal operated as a *supersedeas* of the judgment originally rendered by the Circuit Court, and that until the judgment of the Supreme Court had been made the judgment of the Circuit Court, by an order for that purpose, there was no judgment of which the Circuit Court could award execution. This proposition rests upon the unfounded assumption that the former appeal operated as a *supersedeas* of the judgment originally rendered. Our act to regulate appeals in criminal cases (18 Stat., 737), does not provide that an appeal shall operate as a *supersedeas* of the judgment appealed from; but, on the contrary, expressly provides that a notice of appeal in such cases "shall operate as a stay of the execution of the sentence until the appeal is finally disposed of." This necessarily implies that the appeal, of itself, has no effect whatever upon the judgment, but simply operates "as a stay of the execution of the sentence," which is the judgment in a criminal case. *State v. McKettrick*, 13 S. C., 439. Hence until it is reversed by the tribunal to which the appeal is taken, it stands unaffected by such appeal, except that it cannot be enforced by execution "until the appeal is finally disposed of."

But when the appeal is disposed of, and it has been ascertained, by the judgment of the tribunal invested with jurisdiction for that purpose, that there is no error of law in the judgment appealed from, there is then no longer any obstacle to its enforcement—no longer any stay of its execution—and it then becomes not only the right, but the duty, of the tribunal which originally

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rendered such judgment to provide for its due execution. When a judgment of the Circuit Court is simply affirmed by the judgment of the Supreme Court, that does not make the judgment so affirmed a judgment of the Supreme Court, and hence, in such a case, we see no necessity for making the judgment of the Supreme Court the judgment of the Circuit Court.

As was said in *Adger & Co. v. Pringle*, 13 S. C., 33: "It is contended that there should have been an order making the judgment of the Supreme Court the judgment of the Circuit Court, and that, until such order was made, the Circuit Court had no jurisdiction to proceed with the case. If the judgment of the Circuit Court had been varied or modified, there would be ground for an order making the judgment of the Supreme Court that of the Circuit Court, but such was not the case. No authority has been shown as rendering it necessary that an affirmed judgment should be supported by such an order, and there is no reason for such a conclusion." We can very well understand that, in a case where the Supreme Court modifies or alters the judgment appealed from, an order may be necessary to make said modified judgment the judgment of the Circuit Court before that court, confined as it is to the enforcement of its own judgments, could proceed to enforce such modified judgment; but where the Supreme Court simply affirms the judgment of the Circuit Court, thereby declaring that it is a valid judgment of that court, and free from any error, we are unable to see any reason why, in such a case, the judgment of the Supreme Court should be made the judgment of the Circuit Court by a formal order to that effect.

The *remittitur* sent down from this court officially informed the Circuit Judge that the judgment of the Circuit Court which had been appealed from was a valid judgment, free from any error of law, and that the appeal therefrom had been finally disposed of. This removed the stay of execution provided for by the statute, and it then became the duty of the Circuit Judge to assign a new day for the execution of the judgment previously pronounced.

The judgment of this court is, that the order of the Circuit Court assigning a new day for the execution of the sentence previously imposed upon the appellant be affirmed; but inasmuch

as the day thus assigned has passed pending this appeal, the case is remanded to the Circuit Court for the purpose of having another day assigned for the execution of the sentence previously imposed upon the appellant.

## STATE v. GLOVER.

1. Where a person with intent to kill administers to a little child a drug which she believes to be poisonous and of sufficient quantity to destroy life, the offence of assault and battery with intent to kill is complete, even though the dose was in fact insufficient for the purpose intended.
2. The charge to the jury in this case did not violate the constitutional provision prohibiting judges from charging on the facts.
3. The statute (*Gen. Stat.*, § 2466) providing a punishment for administering "poison or other destructive thing with intent to kill" did not supersede the common law offence of assault and battery with intent to kill.
4. This court cannot consider exceptions to the judgment below in a law case, based upon a verdict alleged to be unsupported by evidence.

Before ALDRICH, J., Abbeville, June, 1887.

The judge in this case was requested to make the charges, which, upon his refusal, are assigned as error in the first three exceptions. His general charge was as follows:

The first question that you will consider when you go into the room is: Did the defendant, this little girl, give that child Blanche, the daughter of Mrs. Clinkscales, that assafoetida? If you determine that in the affirmative, your next question will be, with what intent did she administer the drug? I do not know, and there is no proof before you, whether assafoetida is a poison or not. You will have to call to your assistance your experience whether a child of that tender age—what effect would an overdose of assafoetida, or whiskey, or any other alcoholic spirits, where it is mixed with any other vegetable matter, have on a child of seventeen months old? You all know what effect an overdose of whiskey would have on a child seventeen months old,

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and you are to judge what effect a dose of *assafœtida* would have on a child seventeen months old.

There is another question, and that is, what was her purpose? And in considering that you will consider this question: What did the defendant mean by concealing the apron? Was it a consciousness on her part that she had done a wrong act, and did she intend to conceal that act from the parents of the child because she had a conviction on her mind that she had violated the law? Now, there is a very familiar case on the books where a boy killed another and the judge decided that the fact of his running away was evidence that he knew that he had done a wrong act. That was the principle that the decision was made upon. If a party violates the law and then tries to conceal it, as to conceal a part of the clothing, or by running away, then that is evidence of the guilt of the person so doing. Now, if she thought that medicine would kill, if she heard Mrs. Clinkscales tell the boy, "Now, mind, one drop of this medicine will kill;" you will take that fact and consider it. Your verdict will be guilty or not guilty. If you have a reasonable doubt, give the prisoner the benefit of it and acquit her.

Other matters are stated in the opinion of this court.

*Mr. E. B. Gary*, for appellant.

*Mr. Orr*, solicitor, contra.

January 5, 1888. The opinion of the court was delivered by

MR. JUSTICE McIVER. The indictment under which this defendant was convicted contained two counts, one charging that the defendant, "in and upon Blanche Clinkscales, an infant, then and there being, did make an assault, and her, the said Blanche Clinkscales, did force to drink a certain deleterious and injurious drug. to wit, tincture of *assafœtida*, thereby producing great and dangerous sickness of the said Blanche Clinkscales, with intent, her, the said Blanche Clinkscales, then and there feloniously, wilfully, and of her malice aforethought to kill and murder, contrary to the form of the statute," &c.; and the other, charging an assault of a high and aggravated nature, the aggravation

alleged being the administering and forcing her to drink "a certain dangerous and deleterious drug, to wit, tincture of assafoetida." The jury having rendered a general verdict of guilty, the defendant was sentenced to imprisonment in the penitentiary for the term of two years, and thereupon she appealed upon the following grounds :

Because the Circuit Judge refused to charge as follows : "1. That even if the prisoner administered tincture of assafoetida to the child, she cannot be convicted unless she administered it in such large quantities as to endanger her life, or to do her great bodily harm. 2. That unless the jury find that assafoetida was administered in such quantity as to endanger life or do great bodily harm, the offence would only amount to a simple assault and battery, and this court not having jurisdiction of simple assault and battery, the jury must acquit. 3. That if the jury find from the testimony that the prisoner, at the time of the alleged offence, was under fourteen years of age, then it is incumbent upon the State to prove that the prisoner was *capax doli* at the time of the alleged offence.

"4. Because his honor charged the jury that they were to judge what effect a dose of assafoetida would have on a child seventeen months old.

"5. Because his honor charged the jury, 'what was her purpose? And in considering that you will consider this question, what did the defendant mean by concealing the apron?'

"6. Because his honor charged the jury, 'Now, if she thought that that medicine would kill—if she heard Mrs. Clinkscates tell the boy, now, mind, one drop of this medicine will kill—you will take that fact and consider it.'

"7. Because his honor did not charge the jury as to the difference between assault and battery of a high and aggravated nature and simple assault and battery, and the jury, under his honor's charge, were not allowed to consider at all whether or not the alleged offence amounted only to a simple assault and battery.

"8. Because his honor refused to grant the motion in arrest of judgment, (1) when it appeared on the face of the indictment that no offence was alleged for which the prisoner could be indicted. (2) When there was no testimony whatever that an

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assault and battery was committed by the prisoner upon Blanche Clinkscales. (3) When there was no testimony that assafoetida was a deleterious or hurtful drug, and no testimony that an assault and battery of a high and aggravated nature was committed. (4) When it appeared from the testimony that the Court of General Sessions did not have jurisdiction of the offence charged. (5) When there was no testimony whatever that an assault and battery was committed in *administering* the assafoetida, and the jury could not, where the prisoner was indicted for assault and battery, consider the properties of the drug, or its effect when *administered*, though they might have done so if the prisoner had been indicted for *poisoning*. (6) When it appears that the statute against poisoning or administering any *other destructive drug*, with intent to kill, is exclusive and prevents a person from being indicted for *assault and battery*, who administers a *destructive drug* with intent to kill."

The first and second grounds of appeal, together with the fourth subdivision of the motion in arrest of judgment, seem to rest upon the assumption that unless the drug was administered in such a large quantity as to endanger life, or cause great bodily harm, the offence could not amount to more than a simple assault and battery. For this assumption we do not think there is any valid foundation. There being two counts in the indictment, and the verdict being a general verdict of guilty, it must be understood to find the highest offence charged, as there was testimony to support it. *State v. Nelson*, 14 *Rich.*, 169; *State v. Scott*, 15 *S. C.*, 434. We must therefore regard this as a conviction under the first count, charging an assault and battery with intent to kill. In such a case the gist of the offence is in the intent, though there must be also some act in the direction of such intent. The agency used to effect the intent may or may not be sufficient for the purpose. If it is sufficient, and yet by reason of some accident or some extraneous cause the agency employed fails to effect the purpose intended, the offence is complete. For example, if one fires a pistol at another, within shooting distance, with intent to kill, the fact that the ball has failed to take effect from some defect in loading the weapon, or from some sudden and unexpected movement of the person fired at, or from any



other cause, the offence is complete, because here is the intent, accompanied by an act done for the purpose of effecting such intent, and the fact that the act done has fallen short of effecting the purpose intended, cannot affect the question. So if a person snaps a loaded gun at his adversary, within shooting distance, with intent to kill, the fact that the gun fails to go off, owing to the condition of the weapon, or some defect in its loading, unknown to the party accused, will not relieve him from the charge of assault with intent to kill; for here, again, the intent is accompanied by an act calculated and designed to effect the purpose intended. These views will be found supported by authority. 1 *Bish. Crim. Law*, ch. LI.

It seems to us, therefore, that there was no error in refusing the requests which are made the basis of the first and second grounds of appeal; and that the fourth subdivision of the ground for a motion in arrest of judgment, cannot be sustained. On the contrary, we are of opinion that the Circuit Judge correctly instructed the jury that the first question for them to determine was whether the defendant administered the drug to the child, and if so, the next question was whether she did so with intent to kill the child. There being testimony to the effect that the defendant had heard that the drug was poisonous, and that a very small portion of it—one drop—would kill, it was wholly immaterial to inquire whether the drug was in fact poisonous, or what quantity would be sufficient to endanger life or cause grievous bodily harm. If the defendant administered the drug with intent to kill, after having heard that it would have that effect, all the elements of the offence charged were present. There was the intent to kill, accompanied by an act which she believed was calculated to effect her intent, and the fact that the act done by her fell short of effecting her intent cannot affect the question.

The third ground is without any testimony whatever to support it. All the testimony taken at the trial is incorporated in the "Case," and there is nothing in it to indicate that the prisoner was under the age of fourteen years; indeed, there is nothing whatever as to her age. It is quite clear, therefore, that there was no error in refusing the request referred to in this ground.

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The fourth, fifth, and sixth grounds of appeal seem to impute error to the Circuit Judge in charging upon the facts, in violation of the provisions of the constitution upon the subject. The entire charge of the Circuit Judge seems to be set out in the "Case," and a careful examination of it fails to show that he in anyway intimated any opinion on the facts to the jury; but, on the contrary, he seems to have left the questions of fact entirely to the jury. The expressions relied upon in these grounds are simply repetitions of the uncontradicted testimony of the witnesses, pointing out the inquiries which such testimony would naturally give rise to.

The seventh ground of appeal might be disposed of by the remark that there was no request that the jury might be instructed as to the difference between simple assault and battery and assault and battery of a high and aggravated nature; but we may also add that we do not see anything whatever in the testimony calling for any such instruction.

It only remains for us to consider such of the subdivisions of the eighth ground as have not before been disposed of. As to the first, it is difficult to conceive of any ground upon which it rests, and none has been suggested in the argument. We infer, however, that this subdivision, as well as the sixth, was designed to make the point that inasmuch as the statute (*Gen. Stat.*, § 2466) prescribes a specific punishment for administering poison or other destructive thing to any person with intent to kill, and inasmuch as the indictment in this case cannot be sustained under that statute, there is no offence charged in the indictment, because there cannot now be any such offence as assault and battery with intent to kill at common law, where the agency employed to effect such intent is such as that mentioned in this indictment. The language of the statute is as follows: "Whoever shall unlawfully and maliciously administer to, or cause to be taken by any person, any poison or other destructive thing, with intent to kill such person \* \* \* shall be guilty of felony," &c. Now, it will be observed that there are at least two marked distinctions between the offence denounced by the statute and that known to the common law. Under the statute there need not be any physical force exerted, or any show or offer of such force;

while at common law there must be either the one or the other, either an assault and battery or an assault. Second, to constitute the offence under the statute the thing administered, or caused to be taken, must be either "poison" or some "other destructive thing;" while, at common law, as we have seen, where the intent to kill is found, the means employed to effect such intent need not necessarily be capable of effecting the result intended, but it will be sufficient to constitute the offence, if the agency employed is believed to be sufficient, and is used for the purpose of effecting the intent to kill. It does not seem to us, therefore, that the statute has superseded the common law offence charged in this indictment.

The second, third, and fifth subdivisions of the eighth ground of appeal, based as they are upon the alleged absence of testimony, certainly constitute no ground for a motion in arrest of judgment. But even regarding them, as they were doubtless intended, as grounds for a motion for a new trial, it is well settled that they cannot be sustained by this court, *State v. Cardoza*, 11 S. C., 195. As is said in that case: "The proper place to examine questions of that nature is at the Circuit, and the decision of the Circuit Court, so long as no error of law is committed by it, is final and conclusive." In the case now under consideration there seems to have been a motion for a new trial submitted to the Circuit Court, which was refused. It may be that no witness *saw* any such actual force exerted by the defendant sufficient to amount to an assault and battery, but if the jury believed that the defendant administered tincture of *assafoetida* to this little child, as their verdict conclusively shows, their common sense would force them to the conclusion that some physical force must have been exerted to compel so small a child to drink such a nauseous drug.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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## STATE v. DAVIS.

1. The charge in this case when considered as a whole, and the language excepted to, when considered in the connection in which used, was not a charge upon the facts, but only a statement of the testimony applicable to the questions at issue.
2. Where the judge plainly instructs the jury that the facts are exclusively with them, he need not, in stating the testimony, reiterate the same instruction.
3. If testimony is incorrectly stated to the jury, or reference to some material testimony omitted in the charge, the proper remedy is to call the attention of the judge to such error or omission at the time, or at least to move for a new trial before the Circuit Court upon that ground.
4. The presumption of insanity arising from a committal to a lunatic asylum, may not be rebutted *only* by evidence of a discharge from the asylum.
5. Where the fact of the homicide is admitted and the only defence is insanity, the judge did not err in saying to the jury, "The diabolical homicide is not denied, provided the person who did it is morally responsible."
6. Points not made by exceptions, but urged in argument, considered *in favorem vitæ*.

Before HUDSON, J., Anderson, October, 1886.

This was a prosecution against Jasper Davis for murder. The opinion states the case.

*Mr. G. E. Prince*, for appellant.

*Mr. Orr*, solicitor, contra.

January 5, 1888. The opinion of the court was delivered by

MR. JUSTICE McIVER. Under an indictment for murder the defendant was convicted, and appeals upon the several grounds hereinafter set out. The person killed was the defendant's own wife, and the circumstances immediately preceding and attending the homicide, as appearing in the testimony, which is fully set out in the "Case," are in brief as follows :

The defendant had been for some time separated from his wife, she, with her children, being in the habit of sleeping at the house

of her brother, who lived but a short distance from her own home. On the night before the homicide was committed, the prisoner went to the house where his wife and children were sleeping, saying to her brother that he wanted to talk "about living together again," to which the brother replied, in substance, that they could have lived together if he (the prisoner) had lived right. The prisoner then went into the room where his wife and children were in bed, but whether he had any, or if so what, conversation with his wife, the testimony does not disclose. The prisoner remained at the house until nearly daylight the next morning, when he left, going in an opposite direction from the house of his wife. Very early in the morning the wife left with her children for her own house, and on the road she was fired at and killed by her husband, who was concealed in the bushes at the side of the road. The gun used by him belonged to one of his relatives with whom he had been staying, and was taken from the relative's house the night before the homicide was committed. As soon as the gun was fired the prisoner made his escape, and after eluding a vigilant search made by the neighbors for several days, the prisoner surrendered himself to some of his relatives, who carried him to jail.

The only defence relied upon was insanity, and upon this subject the testimony tended to show that on June 10, 1884, the defendant was committed to the lunatic asylum by the judge of probate, after the usual examination, one of the physicians who participated in the examination testifying, in substance, that he then thought the defendant was suffering either from hypochondria or monomania, induced by dyspepsia or indigestion, and that the main reason for sending him to the asylum was, that he could there get regular attention and have his diet controlled; that he "bent the law a little in sending him to the asylum." After remaining in the asylum from four to six months, the defendant returned and continued to live in the neighborhood, staying sometimes with one of his relatives and sometimes with another, until September 26, 1886, when the homicide was committed—a period of nearly two years. There was no evidence that he had been formally discharged from the asylum as cured of his malady; the only testimony upon that subject being the statement made to one

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of the witnesses by the defendant, after the homicide was committed: "That he had never been dismissed from the asylum as yet; that he was out on six months' trial;" together with the circumstance that he had been allowed to go at large in the community without any restraint for nearly two years. There was also testimony adduced as to the conduct and demeanor of the defendant after his return from the asylum.

The grounds of appeal are as follows: "1. Because his honor erred in charging the jury that the presumption of insanity was destroyed by defendant's release from the asylum. 2. Because his honor erred in charging upon the facts as follows: 'That he (the defendant) says he was released from the asylum on a trial of six months,' when the defendant had not testified in the case. 3. Because his honor erred in charging: 'That if he (meaning the defendant) was reported to have been cured, then that would begin the presumption of sound mind'—this being calculated to mislead the jury, as there was absolutely no testimony showing or tending to show he had been by the authorities of the lunatic asylum reported as cured. 4. Because, there being no evidence as to how or why the defendant came to be out of the asylum, the following charge of his honor was calculated to mislead the jury, and was therefore error, to wit: 'You take all the facts, the fact of his being sent to the asylum and of his being released, and that destroying the presumption of unsound mind; that puts him upon the footing of other men.' 5. Because his honor erred in assuming in his charge to the jury that the defendant had been released from the lunatic asylum. 6. Because the presumption of insanity could not be overcome by anything short of positive proof of his final discharge from the asylum, and his honor erred in not so charging."

It will be observed that these exceptions proceed mainly upon the idea that the Circuit Judge in his charge to the jury has violated section 26 of art. IV. of the Constitution, which reads as follows: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." This provision of the constitution has been construed in several cases by this court; and in *State v. White*, 15 S. C., 381, where the previous cases were cited, it is said "that the real object of this

clause of the constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge. \* \* \* The judge is not expected to confine himself to a mere statement or repetition of the testimony as it was delivered, but may place it before the jury in the order in which it relates to the propositions which it is adduced to support or contradict, by pointing out the questions of fact which arise, and calling the attention of the jury to the evidence applicable to such questions, yet he should carefully avoid expressing any opinion which he may have formed from the facts, leaving it for the jury to draw their own conclusions unbiassed by any impressions which the testimony may have made upon the mind of the judge."

Testing the charge in this case by the rule thus laid down, we are unable to discover wherein it has been violated. The entire charge, as taken down by the stenographer, together with the corrections made therein by the Circuit Judge in his report,<sup>1</sup> is incorporated in the "Case," and a careful examination of it, as a whole, fails to disclose any ground for the several allegations of error. As we have frequently had occasion to say, it will not do to take up detached extracts from the charge, but it must be considered as a whole, especially must the language objected to, be considered in the connection in which it was used, and not separated from the context. So considering the charge in this case, it will be found that the language specially objected to was used merely as a statement of the testimony applicable to the questions which had been pointed out as arising in the case, and this, clearly, cannot be regarded as any violation of the constitutional provision.

The main, and in fact the only, issue really involved in the case was, whether the defendant was insane at the time the homicide was committed. Upon this issue the jury were properly instructed that all persons are presumed to be sane until the contrary appears, and then the jury were told that the fact that the

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<sup>1</sup> To print the charge as reported by the stenographer would manifestly do Judge Hudson great injustice. He says in his report that his charge was not correctly taken down. I have therefore thought it better to omit it from the report of the case.—REPORTER.

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defendant had been committed to the lunatic asylum would be sufficient to rebut such presumption in this case. The jury were then further instructed that after insanity was once established to their satisfaction, the presumption would be that such a condition of the mind would continue until it in turn was rebutted by the evidence, and their attention was called to the several facts and circumstances relied on to rebut such presumption. We do not see that the Circuit Judge anywhere expressed or even intimated any opinion as to any of these matters; but, on the contrary, he simply collated the facts and circumstances appearing in the testimony applicable to the issues involved, leaving it to the jury to decide for themselves each question of fact as it arose. We do not deem it at all necessary that a Circuit Judge after having once instructed the jury that "the facts are for you exclusively, and of these facts you are the sole judges," as was done in this case, should, when stating the testimony applicable to the several issues involved, precede each statement with an "if"—"if they believed each of the facts so stated."

Some of the exceptions seem to imply that the Circuit Judge misstated the testimony in some particulars. If this were so (though we find no evidence of it), it would constitute no error of law, of which this court could take cognizance. If testimony is incorrectly stated to the jury, or reference to some material testimony omitted in the charge, the proper remedy is to call the attention of the judge to such error or omission at the time, or at least to move for a new trial before the Circuit Court upon that ground. *State v. Jones*, 21 S. C., 596.

In answer to the sixth exception it would be sufficient to say that there was no request to charge the proposition there insisted upon. But even if such a request had been submitted, we are not prepared to say that there would have been any error of law in refusing it. We could not say as matter of law that where insanity has once been established, by the fact that the person in question has been committed to the lunatic asylum, the presumption that the same state of mind continues to exist until it has been overthrown by proof of a final discharge from the asylum. Such a presumption may be rebutted by any satisfactory evidence of restoration to sanity, and there may be evidence of such resto-



ration quite as satisfactory as a formal discharge by the authorities of the asylum.

There are two other specifications of error relied on in the argument here, which, though not covered by the exceptions, may, under the rule laid down in the case of the *State v. McNinch* (12 S. C., 89), *in favorem vitæ*, be considered by this court. The first is that the Circuit Judge violated the rule in telling the jury what was the motive of the defendant in taking the life of his wife, and the second is in using this language in his charge to the jury: "The diabolical homicide is not denied, provided the person who did it is morally responsible." The first has, in effect, already been disposed of by the remarks hereinbefore made as to the statement of the testimony by the judge, which was manifestly not designed or calculated to convey to the jury any impressions which the testimony had made upon the mind of the judge, but simply a statement of what had been testified to.

As to the second, it was clearly not the expression or intimation of any opinion formed by the judge as to any of the issues of fact involved. The only issue really raised in the case was as to the insanity of the accused and the character or degree of the homicide was not, and could not have been, brought in question. In this respect the case differs very materially from the case of *State v. White* (15 S. C., 381), relied on by the counsel for appellant. There the character and degree of the homicide was one of the issues involved and when the judge told the jury "that no doubt a cruel, brutal, and savage homicide had been committed," he expressed in very plain and forcible terms his opinion as to one of the issues involved. Here, however, it was wholly immaterial to the only defence interposed what was the character of the homicide; indeed, the fact that it was attended with circumstances of atrocity might be regarded, as is often urged, as a circumstance in favor of the view upon which the entire defence was based—that the perpetrator of an offence so atrocious must have been insane.

The judgment of this court is, that the judgment of the Circuit Court be affirmed, and that the case be remanded to that court, for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.

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## STATE v. ROBINSON.

1. The judge having fully instructed the jury as to the law of insanity and their duty to acquit the prisoner, if insane when he committed the homicide, did not err in refusing to instruct them that the court was authorized to send the prisoner to the asylum if found by their verdict to be *non compos*. This was a matter with which the jury had no concern.
2. In cautioning the jury not to allow their sympathies to influence their verdict, the judge did not charge on the facts.
3. An indictment is not vitiated by concluding "against the peace and dignity of the same State aforesaid" instead of "against the peace and dignity of the State," as prescribed by the constitution. The additional words did not vary or obscure the sense, and may be rejected as surplusage.

Before WITHERSPOON, J., Beaufort, October, 1886.

This was a prosecution against Sye Robinson for murder. The defence was insanity. The portions of the charge excepted to were as follows :

It is my duty to give you the law, and in giving you the law I cannot indulge in sympathy. It is a noble impulse of the human heart; it has its place, but its place is not here; I am here to tell you what the law is, and you are here to decide whether or not the law in a given case has been violated, for after the law has been given to you, you are to evolve from the facts of the case by the law as applied to that case, and in so doing, you are to throw aside all sympathy and everything extraneous and indulge in nothing but a fair and impartial consideration of the guilt or innocence of the prisoner at the bar, solely under the law and the testimony of the case, as given to you by the court and as you hear it from that stand, you being the sole judges of the testimony. \* \* \* When you go into your room for your conscientious impartial deliberation under your oaths, to ascertain whether or not the law has been violated, it is for you to say whether or not you can in your consciences give a reason why this prisoner should not be convicted. If so, it must be a reasonable conscientious doubt, not a doubt produced by sym-

pathy or anything of that kind; it must be a doubt that comes out of the facts in the case and that is a reasonable doubt, the benefit of which the law always gives the prisoner at the bar. Now, gentlemen, is this party guilty beyond a reasonable doubt of the offence with which he stands charged? That is for you to say. \* \* \* I am satisfied that you will take this case and decide it according to the law as I have given it to you. You must take it without sympathy. The kind of feelings that the human heart indulges for the unfortunate, must not restrain you from doing your duty. Has the law been violated or not? If it has, and the testimony satisfies you beyond a reasonable doubt, then will your verdict be guilty. If it does not, then will your verdict be not guilty.

I have been requested to charge you: "If the defendant is proved upon this trial to be *non compos mentis*, the court is authorized to send him to the lunatic asylum." I will not charge you upon this point. I charge you that you must decide without reference to consequences. You have nothing to do with what the court will do hereafter, for that is going outside of the case. You must consider this case with reference to the law and evidence at the time he killed that man, considering whether or not at that time he was sane; if he was sane, and knew right from wrong, at that time—had sufficient exercise of his reasoning power to discriminate between right and wrong—knew the consequences of his act at that time, and killed him with evil intent, with malice aforethought, either expressed or implied, he is guilty of murder. Therefore you cannot consider the question with reference to outside matters, because if I were to charge you upon them, that would be irrelevant to the issue. You are to consider the facts of the case and nothing else, and apply the same to the law.

Defendant was found guilty. He then moved in arrest of judgment because the indictment did not conclude according to article IV., section 31, of the Constitution. This motion was overruled and the defendant was sentenced to be hanged. He then appealed upon the following exceptions:

I. Because his honor erred, after defendant had interposed the plea of insanity and introduced testimony to sustain said plea,

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in refusing to charge as requested by the defendant that, "If the defendant is proved upon this trial to be *non compos mentis*, the court is authorized to send him to the asylum."

II. Because his honor erred in charging the jury that said request involved matters outside of the case.

III. Because his honor erred in charging the jury, "It is my duty to give you the law and in giving you the law I cannot indulge in sympathy. It is a noble impulse of the human heart. It has its place, but its place is not here."

IV. Because his honor erred in charging the jury: "When they go into their room for their conscientious, impartial, deliberation under their oath, to ascertain whether or not the law has been violated, it is for them to say whether or not they can, in their consciences, give a reason why this prisoner should not be convicted. If so, it must be a reasonable conscientious doubt, not a doubt produced by sympathy or anything of that kind, it must be a doubt that comes out of the facts in the case."

V. Because his honor erred in charging the jury: "I am satisfied that you will take this case and decide it according to the law as I have given it to you. You must take it without sympathy; the kind of feelings that the human heart feels for the unfortunate, must not restrain you from doing your duty."

VI. Because his honor, by repeatedly charging the jury that they must not indulge in sympathy, but must do their duty, influenced the jury in reaching a conclusion by conveying to them the impression which the testimony left upon his own mind, and erred in so charging.

Defendant also excepts to the order of his honor, the presiding judge, overruling defendant's motion in arrest of judgment duly made, upon the following grounds:

I. Because the indictment was fatally defective in that it concluded "against the peace and dignity of the same State aforesaid."

II. Because said indictment was fatally defective in that it did not conclude "against the peace and dignity of the State."

*Mr. J. B. Howe*, for appellant.

*Mr. Murphy*, solicitor, contra.

February 5, 1888. The opinion of the court was delivered by MR. JUSTICE McIVER. Under an indictment for murder the defendant was convicted and appeals upon the several grounds set out in the record. The defence relied on was that the prisoner was insane at the time the deceased was killed. It does not appear that the prisoner was claimed to be insane at the time of the trial, and therefore incompetent to conduct his own defence, or instruct counsel in the management of his case, and hence we need not consider what would have been the proper course in such an event.

The first error assigned covered by the first and second exceptions, is that the Circuit Judge refused to charge the jury as requested by the counsel for defendant, "that if the defendant is proved upon this trial to be *non compos mentis*, the court is authorized to send him to the asylum," saying "that said request involved matters outside of the case." We agree with the Circuit Judge, as this was a matter with which the jury had no concern. The entire charge to the jury seems to be set out in the "Case," from which it appears that the jury were fully instructed as to the law of insanity and its effect, if established, so far as the province of the jury was concerned. They were explicitly told that if they believed the prisoner was insane at the time the homicide was committed, he must be acquitted, and it would have been wholly outside of the issue which the jury were called upon to try to inform them as to what authority had been conferred by statute upon the judge in the event that the prisoner should prove to be insane at the time of the trial. That was a matter with which the jury had nothing whatever to do. The province of the jury was simply to pass upon the issues of fact arising in the case, and they had nothing to do with the consequences of their verdict. *State v. Gill*, 14 S. C., 415. See, also, *State v. Coleman*, 20 S. C., 454-5.

The third, fourth, fifth, and sixth exceptions all impute error to the Circuit Judge in various forms for violating the provisions of the constitution in charging on the facts. A careful consideration of the charge fails to disclose a single instance in which

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the Circuit Judge either expressed or intimated any opinion as to the facts. The main ground of complaint seems to be his cautions to the jury not to allow their sympathies to influence their verdict. In this there surely was no error. The language of the Circuit Judge, which seems to be specially relied upon in support of this allegation of error, is taken from that portion of the charge in which the judge is explaining to the jury what is a reasonable doubt—that it must be a doubt growing out of the facts of the case, and not a doubt generated by sympathy for the accused. In this there was certainly no error, nor is it any intimation of the opinion of the Circuit Judge as to any of the issues of fact involved. It was simply a proper instruction for the guidance of the jury in forming their own opinion as to the facts, uninfluenced by improper considerations, or mere conjecture, not based upon any fact appearing in the case relevant to the issues involved.

The only remaining inquiry is whether there was any error in refusing the motion in arrest of judgment. The indictment concludes in these words, “against the peace and dignity of the same State aforesaid,” whereas the Constitution, in art. IV., sec. 31, declares that “all indictments shall conclude, ‘against the peace and dignity of the State.’” It will be observed that all the words required by the constitution are found in this indictment, and the only difference is that two additional words, “same” and “aforesaid,” not in the constitutional provision, are used in this indictment. The question, therefore, is whether these additional words vitiate the indictment. It is quite clear that the added words do not in the slightest degree vary the sense, nor do they obscure it, but, on the contrary, rather make the language more plain and pointed. In the previous part of the section it is declared that “all prosecutions shall be conducted in the name of the State of South Carolina,” and the additional words found in the conclusion of this indictment—“same” and “aforesaid”—only serve to point more plainly and distinctly to the particular State whose peace and dignity has been violated.

The question, however, has been adjudicated in this State in favor of the view which we adopt, that the conclusion of this indictment substantially conforms to the requirement of the con-

stitution. *State v. Washington*, 1 Bay, 120, 1 A. D., 601; *State v. Anthony*, 1 McCord, 285. It is argued, however, that these decisions were made under the constitution of 1790, in which the words prescribed for the conclusion of an indictment were not placed within quotation marks, whereas in the present constitution such words are placed within quotation marks, showing that it is necessary to use the prescribed words, *and no others*. While we must confess that we are unable to perceive the force of this argument, it will not be necessary to consider it further, inasmuch as the fact upon which it is based is wanting. In the constitution of 1790, as it appears in 1 *Statutes at Large*, page 189, the words in which every indictment is required to conclude, are placed within quotation marks, just like the words now prescribed by the present constitution, and hence the cases above cited are direct authority for the conclusion herein adopted.

It seems to us that the correct view of the matter was taken in the case of the *State v. Hill*, 19 S. C., 435. In that case one of the grounds of the motion in arrest of judgment was that the writ of *venire* did not run in the name of the State of South Carolina, as required by section 31, of article IV., of the present Constitution. The writ commenced, "The State of South Carolina, County of Spartanburg, to the sheriff of Spartanburg County," and it was held that the addition of the words—"County of Spartanburg"—did not impair the validity of the mandate, as they might be regarded as surplusage. So here, although the constitution requires that all indictments shall conclude "against the peace and dignity of the State," yet the concluding words of this indictment—"against the peace and dignity of the *same State aforesaid*"—is a substantial compliance with the mandate of the constitution, as the words italicised may be regarded as mere surplusage.

The judgment of this court is, that the judgment of the Circuit Court be affirmed, and that the case be remanded to the Court of General Sessions for Beaufort County, in the State of South Carolina, in order that a new day may be assigned for the execution of the sentence heretofore imposed upon the defendant by the said Court of General Sessions.

## NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

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No. 2069. *MARTIN v. PATTERSON*. April Term, 1887. The court say that in order to entitle a party to a specific performance of a parol agreement for the purchase of land, he must clearly show an agreement to purchase, which has been partly carried into execution on one side with the consent and approbation of the other, and this must consist of something more than simply paying a portion of the purchase money—there must be entering into possession with valuable improvements, &c. ; and lastly, the party seeking the specific performance must show that he has performed on his part, or having performed in part he is willing and ready to perform the rest, which is implied from the filing of the bill.

In this case plaintiffs proved that their ancestor agreed by parol to purchase from the father of defendants all of a certain tract of land on the south side of a public road that divided the tract, for \$700 ; that the purchaser paid \$481, went into possession, built two houses, sunk a well, planted an orchard, dug ditches, and rented out parts of the place ; and plaintiffs, in their complaint, expressed a readiness and willingness to complete the agreement and demanded specific performance. These facts, found by the Circuit Judge (Hudson) having been sustained by the evidence, he properly decreed a specific performance. OPINION by MR. CHIEF JUSTICE SIMPSON, June 28, 1887. *Ball & Watts*, for appellants. *J. W. Ferguson*, contra.

No. 2077. *DERRY v. HOLMAN*. April Term, 1887. This was an action on a note brought by the assignee. The answer was a general denial. Plaintiff's attorney testified that defendant had admitted his liability on the note, both before and after suit brought, and had promised to pay it. Defendant moved for a



non-suit, on the ground that the assignment had not been proved. The judge (Kershaw) refused the motion and charged the jury that if defendant knew of the assignment when he promised to pay—or if the note was then exhibited to him with the assignment endorsed, and he promised to pay—or if, after summons served on him, he promised to pay—then there was an admission by the defendant of the assignment.

At the close of the evidence, defendant offered to prove that there was a failure of consideration in the note. The judge ruled that he could not do so under his general denial. Defendant then moved for leave to amend his answer. This was refused, the judge saying: "If you had made this motion at the first calling of the docket, or even this morning, stating the reason why, or indicated that you were disabled, I would have seen my way clear to have indulged it; but now, after the case has gone to the jury, it seems to me on the spur of the moment, I should have no hesitation at all."

On appeal by defendant, this court approved and affirmed the above rulings. OPINION by MR. CHIEF JUSTICE SIMPSON, July 4, 1887.

No. 2089. *HOLLADAY v. HOLLADAY*. April Term, 1887. This was an action by judgment creditors, the complaint alleging a voluntary deed by their debtor while indebted, to the defendants, his wife and children, the death of the debtor, judgments obtained by the plaintiffs and returns of *nulla bona* thereon, and that said voluntary deed was fraudulent. The executor was also a party defendant. The defendants interposed an oral demurrer which was overruled by the Circuit Judge (Kershaw), and he further ordered "that the defendants have twenty days after the rising of this court in which to file answers," and "that upon the expiration of the time above provided for the coming in of the answers that this cause be referred to the master, and that he take the testimony and report the same, together with his conclusions of law and fact to this court."

On appeal by defendants, *held*,

1. That this was not an action against heirs to reach real estate descended, but against donees of a voluntary deed to set it aside for fraud, and that the complaint was sufficient.

2. "When the judgments were recovered against the executor, it was not necessary that the wife and children of the debtor should be made parties, for they were privies in estate with the executor and bound by judgments against him as to the existence of the debts and all matters necessarily involved and therein adjudicated."

3. The order of reference was premature, both because it was before the answers were filed, and because an appeal from the order overruling the oral demurrer was then pending.

4. Under the demurrer, the question whether the land conveyed was the debtor's homestead, was not involved. OPINION by MR. JUSTICE MCGOWAN, July 11, 1887. *Perry & Heyward*, for appellants. *Geo. Westmoreland* and *A. C. Welborn*, contra.

No. 2092. *HOLLAND v. KEMP*. April Term, 1887. The complaint alleged as a first cause of action, the execution by defendant to plaintiff of a sealed note which was copied into the complaint; as a second cause of action, the like execution of another sealed note which was copied; and as a third cause of action, the like execution of still another note, which was copied; then followed a paragraph stating in the aggregate the amount due on the three notes and demanding judgment therefor. Defendant demurred separately to the three causes of action, that they did not in themselves state facts sufficient to constitute a cause of action. The demurrers were overruled by the Circuit Judge (Hudson) and defendant appealed. *Held*, that the three causes of action were sufficiently stated; but that there was really only one cause of action embracing three items. And moreover, if imperfectly stated, the proper remedy is not demurrer, but motion before trial to make the averments more definite. OPINION by MR. JUSTICE MCGOWAN, July 12, 1887. *Westmoreland & Dorroh*, for appellant. *T. Q. & A. H. Donaldson*, contra.

No. 2103. *TALBOTT & SONS v. E. J. SANDIFER*. April Term, 1887. This was an action to foreclose a mortgage on a steam engine. The defence was, breach of warranty and offer to rescind. Under issues submitted to the jury, they found that plaintiffs had not complied with their agreement, and that defendant's damages by reason thereof were \$100. The Circuit Judge (Witherspoon) declined to rescind, but ordered a credit of \$100 to be entered on

plaintiffs' note, and a foreclosure for the balance. Defendant appealed upon the single ground that he should have been allowed to enter up judgment on the verdict. *Held*, that the Circuit Judge was not bound by the verdict, but had the right and it was his duty, to render his own decision. *OPINION* by MR. JUSTICE McIVER, July 20, 1887. *Skinner & Williams*, for appellant. *James E. Davis*, contra.

No. 2111. *LOGAN v. LOGAN*. April Term, 1887. Findings of fact by the master, concurred in by the Circuit Judge (Hudson), in a chancery case, approved. *OPINION* by MR. ACTING JUSTICE PRESSLEY (sitting in the stead of McGOWAN, A. J.), September 26, 1887. *Graydon & Graydon*, for appellants. *Benet & Smith*, contra.

No. 2132. *TALBOTT & SONS v. P. W. SANDIFER*. On April 21, 1883, the plaintiffs sold a steam engine, &c., to defendant, and the following agreement in writing was made:

An agreement made and entered into by and between Talbott & Sons, of the city of Richmond, State of Virginia, of the one part, and P. W. Sandifer, Bamberg, S. C., of the other part.

*Witnesseth*: That the said Talbott & Sons agree to furnish said P. W. Sandifer the following articles, viz., one 20 h. p. standard stationary engine \* \* \* complete, to be ready for delivery on car at Bamberg, S. C., on or about the 1st of June, 1883, for the consideration of the payment of \$1,800, as follows: two hundred dollars cash in hand upon delivery of machinery; six hundred dollars in note, due 1st November, 1883; six hundred dollars in note, due 1st January, 1884, and the delivery at Bamberg, S. C., of one H. P. Bigelow engine, valued at \$400. Note to bear date of bill of lading, with 7 per cent. interest added. The condition of the above contract is, that the legal title and right of property in and to the above described property is to remain and be vested in Talbott & Sons, of Richmond, Virginia, to take possession of the said property at any time after the maturity of said note, or either of them; but in case the said notes are paid off, then the title of said property to vest in the said P. W. Sandifer. Talbott & Sons warrant the above described machinery to be of good material and workmanship, and to perform in a satisfactory manner when properly used; also, are to send a competent man to superintend the setting up and starting of same, free of charge, and are to grant an extension of January note, if necessary. It is understood that no warranty or verbal understanding of any kind

exists in regard to the present contract—other than what is herein expressly stated. In witness whereof, &c.

This agreement was recorded. Defendant paid the cash and executed the two notes, but did nothing more, and in September, 1884, plaintiffs seized and sold the property purchased, and applied the proceeds, \$600, to the first note, and sued for the balance due on the notes, and in a separate action for the recovery of the Bigelow engine. The Circuit Judge (Cothran) ordered a non-suit, in both cases ruling that as the title to the property had never passed out of the plaintiffs, and the possession being again united with the title, the defendant was entitled to the judgment; that if plaintiffs had a cause of action at all, it must be in the nature of a suit for damages, and not upon the written contract, the consideration of which, to wit, the machinery, was now in their possession with title to the same undisputed.

On appeal, this ruling was reversed, this court holding that the contract was not a conditional sale, but an absolute sale, the cash, notes, and engine being accepted as payment, and the property purchased pledged as security. The agreement, therefore, was a mortgage or an instrument in the nature of a mortgage, and plaintiffs were entitled to recover the balance due. *OPINION* by MR. JUSTICE MCIVER, November 25, 1887. *James E. Davis*, for appellant. *Skinner & Williams*, contra.

No. 2138. *STATE ex rel. ZIMMERMAN v. WESTMORELAND*. November Term, 1887. This was a motion in the original jurisdiction of the court to dissolve a preliminary injunction granted on Circuit, an appeal having been taken in the same case. *Held*, that this court has appellate jurisdiction in cases of chancery and has power to correct errors at law. It also has original jurisdiction in certain matters—to issue writs of injunction, *quo warranto*, *habeas corpus*, and such other original and remedial writs as may be necessary to give the court a general supervisory control over all other courts in the State. Const., art. IV., § 4. This motion cannot be entertained under either of these powers. The Supreme Court has power to grant a writ of injunction, but it has no power to dissolve an injunction granted on Circuit. Motion refused. *PER CURIAM*, December 6, 1887. *J. H. Heyward*, for the motion.

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### CONDITIONAL SALE.

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### CONFESSION.

*See* CRIMINAL LAW, 8.

### CONSTITUTIONAL LAW.

*See* HOMESTEADS, RAILROADS, 7-10.

1. Imposing penalty for receiving usury on an existing usurious contract does not impair the obligation of a contract, nor is it retroactive. *Hardin v. Trim-mier*, 3, 7, 111

2. CONSTITUTION OF 1868, art. I., § 8, that jury are judges of law in libel, construed. *State v. Syphrett*, 29

3. Art. I., § 18, party once acquitted cannot be tried again. *Ibid.*, 34

4. Art. I., § 23, as to taking of private property, stated. *R. R. Co. v. Gibbes*, 403

5. Art. I., § 36, does it apply to corporations? *Ibid.*, 395

6. Art. II., § 33, as to taxes, stated. *Ibid.*, 403

7. Art. IV., § 4, powers of the Supreme Court in the matter of injunction, construed. *State ex rel. Zimmerman v. Westmoreland*, 625

8. Art. IV., § 19 jurisdiction of county commissioners over ferries, stated. *Chick v. Newberry*, 419

9. Art. IV., § 26, not violated by charge in this case. *State v. Moorman*, 2, 22  
*State v. Glover*, 2, 602  
*State v. Davis*, 1, 5, 609  
*State v. Robinson*, 2, 615

10. Art. IV., § 31, concluding

formula of indictments, construed. *State v. Robinson*, 3, 615

11. Art. IX., § 1, does it apply to corporations? *R. R. Co. v. Gibbes*, 401

12. Art. XII., §§ 1, 2, as to amendments of charters, considered. *Ibid.*, 385

13. Art. XIV., § 8, rights of married women, construed. *Brown v. Thomson*, 500  
*Gwynn v. Gwynn*, 1, 525  
*Bridgers v. Howell*, 425

#### CONTINUANCES.

See PRACTICE, 1.

#### CONTRACTS.

1. Amendment to statute takes effect at its date, leaving prior law operative on prior contracts. *Hardin v. Trimmier*, 6, 111

2. Bond and mortgage to secure overdrafts by S. secured also overdrafts of S. & Co. *Sawyer v. Senn*, 1, 251

3. S. then made deposits with right to check out. Held, no fraud on S's surety on this bond. *Id.*, 2, 251

4. Surety gave her note and proceeds were credited on deposit account and then withdrawn and cancelled. Neither surety nor her subsequent mortgagee could claim that such credit was payment. *Id.*, 3, 251

5. Where mortgage secures over-

drafts of S., it may be shown by parol what overdrafts create an indebtedness against S. *Id.*, 4, 251

6. Written contract of sale here was complete, although signed only by seller. *Bulwinkle v. Cramer*, 3, 377

#### CORPORATIONS.

See RAILROADS, 7-10.

1. Has a corporation the rights guaranteed by the constitution to individuals? *R. R. Co. v. Gibbes*, 3, 385

2. Denial does not put in issue the corporate existence or right to sue of plaintiff. *American Co. v. Hill*, 2, 164

3. MUNICIPAL, liable for damages only under statute. *Chick v. Newberry*, 2, 4, 419

#### COSTS.

1. Costs are purely statutory and cannot be extended by courts. *Scott v. Alexander*, 1, 15

2. No rule requires printing for Circuit Court, and no costs therefore are allowed. *Ibid.*, 2, 15

3. Fees of a special stenographer cannot be taxed as a disbursement. *Ibid.*, 5, 15

4. Items of costs under new issues not taxable against parties not concerned. *Ibid.*, 6, 15

5. Clerk entitled to docket fee for every term. *Id.*, 9, 16

6. Costs on offer in trial justice court allowed after several appeals. *Williford v. Gadsden*, 87

7. When defendant is permitted to answer on paying certain expenses, they should first be ascertained by reference. *Brown v. Brown*, 153

8. On overruling demurrer, judge may impose payment of costs as condition of leave to answer. *Lourey v. Jackson*, 6, 318

9. Claim for examining pauper lunatics properly rejected, proof not showing the requirements of law. *Green v. Co. Com'rs*, 3, 9

#### CO-TENANCY.

Minority of one co-tenant protects all from the running of the statute. *Boozar v. Teague*, 10, 349

#### COUNSEL FEES.

On vacating deed for fraud, attorneys entitled to fee, but only out of fund going to creditors. *Wagener v. Mars*, 7, 97

#### COUNTY.

1. Court of Common Pleas has jurisdiction of action *ex delicto* against county, for negligence of its officers. *Chick v. Newberry*, 1, 419

2. County not liable for injury caused by ferry boat. A ferry is not a highway. *Id.*, 2, 3, 419

3. County not estopped by acts of its officers not authorized by statute. *Id.*, 5, 419

#### COUNTY COMMISSIONERS.

1. On appeal from county commissioners only errors alleged in exceptions are before Circuit Court. *Green v. County Commissioners*, 1, 9

2. If board not satisfied with proof of claim, not bound to require further proof. *Ibid.*, 2, 9

3. Claim for examining pauper lunatics properly rejected, proof not showing the requirements of law. *Ibid.*, 3, 9

4. Can Circuit Court remand case to county commissioners for new trial? *Ibid.*, 4, 9

#### COURTS.

1. SUPREME. Argument of opinion is not binding—only the points decided. *Garvin v. Garvin*, 2, 472

2. This court may grant an injunction, but cannot dissolve one granted on Circuit. *State v. Westmoreland*, 625

3. COMMON PLEAS. Can Circuit Court remand case to county commissioners for new trial? *Green v. Com'rs*, 4, 9

4. Court of equity may consider question of damages when asserted as counter-claim to equitable action. *Boulard v. Carpin*, 2, 236

5. Common Pleas has jurisdiction of action *ex delicto* against county for negligence of its officers. *Chick v. Newberry*, 1, 419
6. Cannot assign homestead, but may adjudicate right thereto. *Bridgers v. Howell*, 3, 425
7. INFERIOR.—See *Trial Justices*.

### COVENANTS.

1. No implied warranty in sale of land. *Lessly v. Bowie*, 2, 193
2. What a general covenant embraces—and how the purchaser may recover on it. *Id.*, 3, 193
3. Dower is an encumbrance—when and how the purchaser may recover damages therefor. *Id.*, 4, 193
4. Paramount title is breach of covenant of seizin at date of deed. How court of law and equity will grant relief, and what and when. *Id.*, 5, 193
5. Warranty in this case was not ambiguous; it excepted an encumbrance from the warranty. *Boozier v. Teague*, 3, 348

### CRIMINAL LAW.

1. Prisoner put on trial and trial adjourned over not entitled to a discharge. *State v. Briggs*, 3, 80
2. Panel exhausted should be filled by additional venire and not have the trial adjourned over. Only extraordinary circumstances justify an adjournment of a trial. *Id.*, 4, 81

3. Appeal stays sentence, but does not affect judgment, which, if affirmed, should be enforced by appointment of new day for execution. *State v. Prater*, 1, 599
4. ARREST OF JUDGMENT cannot be ordered where offence is sufficiently charged. *State v. Syphrett*, 2, 29
5. ASSAULT AND BATTERY WITH INTENT TO KILL.—The intent may exist even though the means adopted prove to be inadequate, *e. g.*, quantity of drug insufficient. *State v. Glover*, 1, 602
6. This offence, as at common law, is not superseded by Gen. Stat., § 2466. *Ibid.*, 3, 602
7. CHALLENGE is a sacred right. Refusal to allow twenty because of challenges the week before was error. *State v. Briggs*, 5, 81
8. CONFESSION.—Judge must be satisfied that confession is free before he receives it. *State v. Moorman*, 1, 22
9. INDICTMENT.—Demand for copy indictment came too late. *State v. Briggs*, 2, 80
10. Concluding words of indictment here were sufficient, although not in constitutional form. *State v. Robinson*, 3, 615
11. LIBEL not published where libellee (not being able to read) got his wife to read the letter. *State v. Syphrett*, 4, 29
12. In prosecutions for libel the



judge should instruct the jury as to the law. *Id.*, 1, 29

13. As to allegation in libel of intent to provoke a breach of the peace. *Id.*, 3, 29

### DAMAGES.

1. Court of Equity may consider question of damages when asserted as counter-claim to equitable action. *Boulard v. Carpin*, 2, 236
2. Mortgagor cannot recover damages for seizure of property pointed out by himself to the agent. *McGowan v. Reid*, 4, 263
3. Father, for nursing his son negligently injured, might recover amount of contract wages lost, but not speculative earnings. *Bridger v. R. R. Co.*, 3, 456

### DECREE.

See JUDGMENTS.

### DEEDS.

1. Deed signed by one of two witnesses after death of grantor, and for valuable consideration, upheld against heirs of grantor. *Young v. Young*, 2, 201
2. An absolute deed cannot be shown by parol to have been on condition. *Boozar v. Teague*, 2, 348

### DEMURRER.

See PLEADINGS, 19.

### DESCENT AND DISTRIBUTION.

1. At partition sale, husband of distributee purchased to about her share—others failed to comply, and there was resale for less amount. Held, that share of such distributee was a third of the money actually realized, for which amount her husband's bond (she consenting) should be credited. *Turbeville v. Flow-ers*, 1, 331
2. Assets cannot be distributed until all are converted into money. *Id.*, 2, 331
3. Distributees liable for interest on purchases from day of sale. *Id.*, 3, 331

### DOWER.

1. Dower is an encumbrance. When and how the purchaser may recover damages therefor. *Lessly v. Bowie*, 4, 193
2. Widow entitled to dower in land purchased by her husband and another in partnership, who mortgaged the same, when the land was afterwards sold to a third person who took up the mortgage. *Agnew v. Renwick*, 1, 562
3. Debt being more than twenty years old will be presumed paid. *Id.*, 4, 562

### EQUITABLE ASSIGNEE.

See MORTGAGES, 9.

## ESTOPPEL.

See MARRIED WOMEN, 7, 10.

1. Continued payments by other partners after learning of a fraud practised on them by parties to whom paid did not estop them. *Whitman v. Bowden*, 4, 53
2. Voluntary payment does not estop debtor from demanding the penalty under usury law. *Hardin v. Trimmier*, 5, 111
3. Where party took mortgage and an assignment of mortgage under assurances from C. that the title was good, C. cannot afterwards defeat these mortgages by asserting paramount title. *Wardlaw v. Rayford*, 3, 178
4. Where maker told purchaser that note was all right, he cannot afterwards defeat his recovery thereon on plea of failure of consideration. What such a representation amounted to. *Lites v. Addison*, 2, 3, 226
5. Representation will work estoppel in favor of purchaser of past due note, although no intention to deceive. *Id.*, 4, 227
6. Estoppel need not be specially pleaded—certainly not to an answer. *Id.*, 5, 227
7. A creditor held bound by proceedings for sale of land where he knew of proceedings and did nothing, although only a surety for the debt of the intestate, but holding a judgment as indemnity, and the purchaser took a good title. *Id.*, 5, 6, 436

8. His only remedy was against the proceeds of the sale, he being ignored through his own laches. *Id.*, 7, 436

## EVIDENCE.

1. Whether deed from A to B was intended as mortgage by C may be shown by parol. *Nesbitt v. Cavender*, 2, 1
2. But there being no such agreement, parol evidence not admissible to show agreement by B to reconvey to C. *Ibid.*, 3, 1
3. Statements by employees of trains after a person has been killed on the track are not admissible as *res gestae* nor as declarations of an agent. *Petrie v. Railroad Company*, 2, 63
4. Plaintiff may at any stage of the trial call for evidence of defendant's witness examined before a notary. Refusal to accord this right is ground for vacating nonsuit. *Id.*, 3, 63
5. It must be left to a party to determine the order in which he will adduce his testimony. *Id.*, 4, 63
6. In action to cancel deed for fraud, evidence may be received of tax returns, other property, assignments, &c. *Wagener & Co. v. Mars*, 2, 97
7. Party may disprove facts as stated by his own witness. *Id.*, 3, 97
8. Parol testimony generally inadmissible to show that maker of note was agent, but complaint

- so alleging is good. *Tarver v. Garlington*, 107
9. Account may be proved by book entry, recollections, and admissions. *Walker v. Laney*, 3, 150
10. When witness gives incompetent testimony, motion should be made to strike out. *Wardlaw v. Rayford*, 2, 178
11. In action by beneficiary to recover policy from bank, officers may testify to communications with the assured, deceased. *Macaulay v. Bank*, 1, 215
12. Where mortgage secures overdrafts of S., it may be shown by parol what overdrafts create an indebtedness against S. *Sawyer v. Senn*, 4, 251
13. Number of witnesses required to a paper should all be produced to prove it. *McGowan v. Reid*, 2, 263
14. Chattels may be seized under mortgage by agent appointed by parol. If appointment be in writing, witness not necessary to prove it. *Id.*, 3, 263
15. Written contract may be applied to proper subject matter by parol, *e. g.*, to show that mortgage to secure note was to secure future advances. *Moses v. Hatfield*, 1, 324
16. Title being in a party, he who asserts that it has passed out must show it. *Boozer v. Teague*, 1, 348
17. An absolute deed cannot be shown by parol to have been on condition. *Id.*, 2, 348
18. Warranty in this case was not ambiguous; it excepted an encumbrance from the warranty. *Id.*, 3, 348
19. No evidence here to show accident or mistake. *Id.*, 4, 348
20. Party in interest (though not answering) may testify to receipt of letter from deceased, but not as to contents. *Ibid.*, 11, 349
21. Declarations of former owner to show claim of title may be proved in reply. *Id.*, 12, 349
22. And defendants could not reply thereto, especially as the testimony so offered was afterwards considered by the judge on motion for new trial. *Id.*, 13, 349
23. In action to recover price of unsound corn sold on written paper, it cannot be shown by parol that sellers were agents. *Bulwinkle v. Cramer*, 1, 3, 376
24. Doctrine of parol testimony as to written papers, fully stated. *Id.*, 2, 376
25. In action for injury by turntable evidence admissible of boy's intelligence, but not of his prudence. *Bridger v. R. R. Co.*, 1, 456
26. Evidence of former accidents on turn-table not known to defendant, inadmissible. *Id.*, 2, 456
27. Plaintiff showing that one

company kept its tables locked, defendant might show that others did not. *Id.*, 5, 457

28. Evidence of opinion, hearsay, and inference properly excluded. *Id.*, 6, 457

29. Evidence of long user of road on defendant's land admissible as a link to establish a right of way appendant. *Whaley v. Stevens*, 2, 549

30. Discharge from asylum is not the only evidence to rebut insanity. *State v. Davis*, 4, 609

## EXCEPTIONS.

*See* PRACTICE, 3.

## EXECUTORS AND ADMINISTRATORS.

1. Administrator cannot avail himself of statute of limitations after decree finding that he had received and paid out the funds. *Montgomery v. Cloud*, 1, 188

2. Administration in 1861, return in 1868, action in 1884. Administrator liable to account. *Id.*, 2, 188

3. In action to subject real estate descended to payment of debts, administrator should be a party to account for personalty. *Lowry v. Jackson*, 2, 318

4. Assets cannot be distributed until all are converted into money. *Turbeville v. Flowers*, 2, 331

5. Distributees are liable for inter-

est on purchases from day of sale. *Id.*, 3, 331

6. Administrator liable for notes and Confederate money where he failed to prove their loss. *Id.*, 4, 5, 331

7. Power to executors to divide was not personal and therefore might be exercised by only one. *Smith v. Winn*, 2, 591

8. Married woman, trustee, and others bound by partition made by such executor—they assent. *Id.*, 3, 591

## FEEES.

*See* COSTS.

## FERRIES.

County not liable for injury caused by ferry boat. A ferry is not a highway. *Chick v. Newberry*, 2, 3, 419

## FRAUDS.

1. Where A pays money and B takes deed by permission, trust results to A. If fraudulently done, no title vests in B. *Ramage v. Ramage*, 39

2. In action to cancel deed for fraud, evidence may be received of tax returns, other property, assignments, &c. *Wagner & Co. v. Mars*, 97

3. Voluntary deed executed to defraud creditors is void as to them. *Id.*, 5, 97

4. On vacating deed for fraud,

- court may order land sold. *Id.*, 6, 97
5. On vacating deed for fraud, attorneys entitled to fee, but only out of fund going to creditors. *Id.*, 7, 97
6. Mortgage is not void even though mortgagor is insolvent, it covers his all, and is not to be recorded for 40 days. *Magovern v. Richard*, 3, 272
7. One creditor in judgment may sue for all creditors to vacate deeds for fraud. *State v. Foot*, 1, 340
8. If judgment was obtained only as security, but also for costs, action might be maintained. *Id.*, 2, 340
9. Not necessary to allege return of *nulla bona*. *Id.*, 3, 340
10. If assignment, after judgment, disposed of property not accessible to judgment, the plaintiff in judgment might maintain such action. *Id.*, 4, 6, 340
11. Complaint sufficiently alleged a cause of action although failing to state that the fraudulent mortgage would exhaust the land. *Id.*, 5, 340
12. Fraudulent mortgage at one time and assignment at another is only one cause of action. *Id.*, 7, 340
13. Creditors may follow money of their debtor expended for land bought in his wife's name, but not the land itself. *Bridgers v. Howell*, 4, 425
14. Where debtor uses his money to buy land for his wife, she may retain so much thereof as was his chattel exemption. *Id.*, 7, 425
15. Proceeds of sale of land under vacated deed not applicable to all creditors, where no such point was raised in any form in the court below. *Id.*, 8, 425
16. STATUTE OF. Whether deed from A to B was intended as mortgage by C, may be shown by parol. *Nesbitt v. Cavender*, 2, 1
17. But there being no such agreement, parol evidence not admissible to show agreement by B to reconvey to C. *Ibid.*, 3, 1
18. Evidence here too shadowy for specific performance as it was within the statute, and the payment of purchase money and possession were not part performance. *Boozer v. Teague*, 6, 348
19. Contract in writing for sale of land must fully show terms. It cannot be supplemented by parol. *Ibid.*, 7, 348
20. Improvements erected and obligations paid do not raise contract to reconvey. *Id.*, 8, 349
21. What will entitle party to specific performance of parol contract for conveyance of land. *Martin v. Patterson*, 621
- GENERAL STATUTES.
1. Section 623, permitting county commissioners to require further

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| <p>proof, construed. <i>Green v. Commissioners</i>, 2, 9</p> <p>2. Section 1087, flat boat at a ferry is not a highway. <i>Chick v. Newberry</i>, 419</p> <p>3. Section 1094, as to duty of county commissioners on boundary lines, stated. <i>Id.</i>, 423</p> <p>4. Sections 1149, 1150, as to granting charters to ferries, stated. <i>Id.</i>, 424</p> <p>5. Section 1288, usury law, construed. <i>Hardin v. Trimmer</i>, 113</p> <p>6. Section 1361, as to amendments of charters, construed. <i>R. R. Co. v. Gibbes</i>, 385</p> <p>7. Section 1451, as to railroad commission, considered. <i>Id.</i>, 401</p> <p>8. Section 1453, regulating payment of railroad commission, considered. <i>Id.</i>, 397</p> <p>9. Section 1525, requiring railroad company to give notice of accidents, construed. <i>Adkins v. Railway Co.</i>, 71</p> <p>10. Section 1775, form of release, considered. <i>Young v. Young</i>, 205</p> <p>11. Section 1776, as to effect of not recording, construed. <i>Carraway v. Carraway</i>, 1, 576</p> <p>12. Section 1776, does not affect a mortgage under recording act of 1843. <i>Bloom v. Simms</i>, 90</p> <p>13. Section 1835, does not authorize claim for betterments by de-</p> | <p>fendant in foreclosure. <i>Lessly v. Bowie</i>, 197</p> <p>14. Sections 1835-1841, betterment law, considered. <i>McKnight v. Cooper</i>, 94</p> <p>15. Section 2014, assignment act, construed and applied. <i>Magovern v. Richard</i>, 1, 272</p> <p>16. Section 2016, right to appoint a receiver under. <i>Pelzer v. Hughes</i>, 408</p> <p>17. Section 2035, does not give to wife her earnings. <i>Bridgers v. Howell</i>, 429</p> <p>18. Section 2036, mortgages by married women, construed. <i>Gwynn v. Gwynn</i>, 2, 525</p> <p>19. Section 2037, rights of married women, construed. <i>Brown v. Thomson</i>, 500<br/><i>Bridgers v. Howell</i>, 429<br/><i>Gwynn v. Gwynn</i>, 3, 525</p> <p>20. Section 2115, powers of judges at chambers in partition, construed. <i>Woodward v. Elliott</i>, 373</p> <p>21. Section 2213, as to proof of notes and bonds, stated. <i>McGowan v. Reid</i>, 265</p> <p>22. Section 2255, requires additional <i>venire</i> for deficiency of jurors. <i>State v. Briggs</i>, 4, 81</p> <p>23. Section 2299, leaves legal title in mortgagor. <i>Johnson v. Johnson</i>, 315</p> <p>24. Section 2466, as to administering poison, &amp;c., construed. <i>State v. Glover</i>, 602</p> |
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25. Section 2637, requiring additional jurors to supply deficiency, stated. *State v. Briggs*, 82

### GUARANTY.

Guaranty here was not a continuing one. *Sawyer v. Senn*, 5, 251

### GRANT.

To avoid grant which is regular on its face, party must show that conditions of statute were not complied with, and were possible to be complied with. *Framp-ton v. Wheat*, 2, 3, 288

### HEIRS.

1. In action to subject real estate descended to payment of debts, administrator should be a party to account for personalty. *Lowry v. Jackson*, 2, 318
2. Liability of the heirs is a legal consequence, and no promise by them to pay the debt need be alleged. *Ib.*, 3, 318
3. Action here was against defendants as donees of voluntary deed and not heirs at law. And they are bound by judgment against executor of their deceased donor, as privies in estate. *Hollady v. Hollady*, 622

### HOMESTEAD.

1. Common Pleas cannot assign homestead, but may adjudicate right thereto. *Bridgers v. Howell*, 3, 425

2. In such land there is no resulting trust to husband and no estate in him out of which he can claim homestead. *Id.*, 5, 425

3. Homestead may be claimed out of an equitable title. *Id.*, 6, 425

4. Where debtor uses his money to buy land for his wife, she may retain so much thereof as was his chattel exemption. *Id.*, 7, 425

5. Under demurrer to complaint to vacate deed for fraud, question of homestead is not involved. *Hollady v. Hollady*, 622

### HUSBAND AND WIFE.

*See* MARRIED WOMEN.

### IMPROVEMENTS.

*See* BETTERMENTS.

### INDICTMENT.

*See* CRIMINAL LAW, 9.

### INFANTS.

1. Deed by infant is not void, but voidable by himself or his heirs. *Ihley v. Padgett*, 1, 300
2. From the facts in this case, confirmation by the infant after majority was inferred. *Id.*, 2, 300
3. Infant, after majority, may sue to vacate his deed made in infancy of an interest in remainder,

although not yet entitled to the possession of such interest. *Id.*, 3, 300

4. Under formal answer of infant, nothing is *res judicata* except what is decreed. Decree that intestate died in possession does not adjudicate his seizin. *Boozar v. Teague*, 9, 349

5. Minority of one co-tenant protects all from the running of the statute. *Boozar v. Teague*, 10, 349

### INJUNCTION.

1. Interlocutory injunction is matter of grace, and not interfered with where it preserves *status quo*. *Pelzer v. Hughes*, 1, 408
2. When the court may appoint receiver of assigned estate. *Id.*, 3, 4, 408
3. This court may grant an injunction, but cannot dissolve one granted on Circuit. *State v. Westmoreland*, 625

### INSANITY.

1. Discharge from asylum is not only evidence to rebut insanity. *State v. Davis*, 4, 609
2. Judge not bound to tell jury he could send prisoner to asylum if found insane. *State v. Robinson*, 1, 615

### INSURANCE.

Policy in this case was vested, and a share of a child dying passed

to his father, the assured, which might by him be pledged for a debt. *Macaulay v. Bank*, 2, 3, 215

### INTEREST.

*See* USURY.

### JUDGMENTS.

1. The judge's reasoning is no part of a decree. *Morgan v. Keenan*, 248
2. Circuit Judge cannot change final decree, but only order it carried out. *Dial v. Gary*, 1, 171
3. Judge cannot direct order in which lots shall be sold under decree previously rendered. *Id.*, 2, 171
4. Decree is erroneous if based on ground not raised by pleadings. *Magovern v. Richard*, 2, 272
5. Decree operates from time it is delivered for filing, and not from its date. *Cromer v. Boines*, 2, 436
6. Where judge heard a case during his term, filed his decree after term expired and after re-election handed it again to the clerk of court, it was a valid decree. *Id.*, 4, 436
7. Sale under new judgment obtained by surety based upon old judgment paid off by him, might be referred to the old judgment. *Garvin v. Garvin*, 1, 472
8. Judgment affirmed, need not be



adopted by Circuit Court. *State v. Prater*, 2, 599

### JURIES AND JURY TRIALS.

1. Panel exhausted should be filled by additional venire, and not have the trial adjourned over. Only extraordinary circumstances justify the adjournment of a trial. *State v. Briggs*, 4, 81
2. Judge cannot by reference defeat jury trial, but has discretion in equity cases. *Boulard v. Carpin*, 1, 235
3. Judge may refer case in chancery involving fraud to master to take testimony; parties cannot demand a jury. *Pelzer v. Hughes*, 5, 409
4. On motion for new trial judge properly refused to hear of juror expressing opinion before trial. *Bridger v. R. R. Co.*, 10, 457
5. Judge not bound by verdict in chancery case, but should render his own judgment thereon. *Talbott & Sons v. E. J. Sandifer*, 623

### JURISDICTION.

*See* PARTITION, 2.

### LANDLORD AND TENANT.

Survivor may enforce note given to him and another for rent—no matter who owned the land. *Monday v. Elmore*, 5, 126

### LIBEL.

*See* CRIMINAL LAW, 11.

### LIENS.

*See* AGRICULTURAL LIENS.

### LIMITATION OF ACTIONS.

1. Proper way to plead statute of limitations. *Walker v. Laney*, 4, 150
2. Administrator cannot avail himself of statute of limitations after decree finding that he had received and paid out the funds. *Montgomery v. Cloud*, 1, 188
3. Administration in 1861, return in 1868, action in 1884—administrator liable to account. *Id.*, 2, 188
4. Possession of chattel by mortgagor after default is not adverse. *McGowan v. Reid*, 6, 263

### LIMITATION OF ESTATES.

1. Intention of testator to be ascertained from will and environments, govern construction. *Jaudon v. Ducker*, 1, 295
2. Pecuniary legacies of this will were a charge on the realty devised as a residue. *Id.*, 2, 295
3. Devise to one in trust for D. for life, "and after her death to her issue to take *per stirpes*, their heirs and assigns forever," construed. *Gourdin v. Deas*, 479
4. Conveyance in trust for L. and

her children (she then having some) makes L. a tenant in common with her children. *Wallace v. Craig*, 2, 514

## MARRIED WOMEN.

*See DOWER.*

1. At partition sale, husband of distributee purchased to about her share—others failed to comply and there was resale for less amount. Held, that share of such distributee was a third of the money actually realized, for which amount her husband's bond (she consenting) should be credited. *Turbeville v. Flowers*, 1, 331
2. Wife's earnings belong to her husband, and property purchased therewith is his. *Bridgers v. Howell*, 1, 2, 425
3. Married woman liable for supplies, &c., purchased by her for her plantation, but not for those used by herself and family. *Brown v. Thomson*, 500
4. The constitution of this State confers upon married women no power to contract. *Gwynn v. Gwynn*, 1, 525
5. Nor do the statutes except where the contract is as to her separate estate. *Id.*, 2, 3, 525
6. A married woman cannot enter into a contract of partnership, and why. *Id.*, 4, 526
7. Her acts and representations in this regard would not operate as an estoppel. *Id.*, 5, 526
8. May a married woman sell her estate and apply proceeds to her husband's debts? *Id.*, 7, 526
9. Under deed of assignment, trust results to grantor, and when by a married woman, it results after debts are paid for which she is legally liable. *Id.*, 8, 526
10. Recognition of a partnership and its debts in a deed of assignment by a married woman did not validate either. *Id.*, 9, 526

## MORTGAGES.

*See EVIDENCE.*

1. Covenant to ship naval stores contained in a mortgage, construed not to be a mortgage of naval stores and paper construed not to be agricultural lien. *Whitden & Co. v. Pearce*, 3, 44
2. Mortgage under act of 1843 not recorded in time, void as to purchaser subsequent to date of record. *Bloom v. Simms*, 1, 2, 90
3. Recording act of 1876 applies only to instruments subsequently executed. *Id.*, 1, 90
4. Mortgage may be foreclosed although note is void by alteration. *Smith v. Smith*, 166
5. Liability of two lots for judgment of two separate debts of A and B, under a joint mortgage, of peculiar form. *Dial v. Gary*, 3, 171
6. Mortgage cannot be foreclosed for more than penalty of bond. *Id.*, 4, 171

7. Can judgment be rendered for debt before foreclosure and report on deficiency? *Id.*, 5, 171
8. Where party took mortgage and an assignment of mortgage under assurances from C that the title was good, C cannot afterwards defeat the mortgages by asserting paramount title. *Wardlaw v. Rayford*, 3, 178
9. A party taking up a first mortgage and then taking a new one for same debt, is in privity with first mortgagee, or at least equitable assignee. *Id.*, 4, 178
10. Claim for improvements cannot be made by defendant in foreclosure—only in action for recovery of land. *Lessly v. Bowie*, 1, 193
11. Administrator of deceased mortgagor not necessary party to an action of foreclosure. *Butler v. Williams*, 1, 221
12. Nor are the heirs at law of a deceased mortgagor who had assigned his estate. *Id.*, 2, 221
13. Bond and mortgage to secure overdrafts by S. secured also overdrafts of S. & Co. *Sawyer v. Senn*, 1, 251
14. Surety gave her note and proceeds were credited on deposit account and then withdrawn and cancelled—neither surety nor her subsequent mortgagee could claim that such credit was payment. *Id.*, 3, 251
15. Where mortgage secures overdrafts of S. it may be shown by parol what overdrafts create an indebtedness against S. *Id.*, 4, 251
16. A mortgage with intent to prefer is not an assignment, and is valid. *Magovern v. Richard*, 1, 272
17. Mortgage is not void even though mortgagor is insolvent, it covers his all, and is not to be recorded for 40 days. *Id.*, 3, 272
18. Court will closely scrutinize sale made under power in the mortgage. *Johnson v. Johnson*, 2, 309
19. Legal title of mortgagor passes under the power of sale only when deed is made in his name. *Id.*, 3, 309
20. Such power cannot be revoked by mortgagor, but is not coupled with interest and terminates at mortgagor's death. *Id.*, 4, 309
21. Action by purchaser without proper title for recovery of land cannot be converted into action for foreclosure. *Id.*, 5, 309
22. Written contract may be applied to proper subject matter by parol, *e. g.*, to show that mortgage to secure note was to secure future advances. *Moses v. Hatfield*, 1, 324
23. No error in refusing to require production of the note when it did not appear that such a note ever existed or was negotiable. *Id.*, 2, 325
24. One partner may assign mortgage and evidences of debt secured thereby. *Id.*, 4, 325

25. Unrecorded mortgage is good between the parties and as to all the world except subsequent creditors or purchasers. It has priority of subsequent judgment on antecedent debt. *Carraway v. Carraway*, 1, 2, 576

26. Widow entitled to dower in land purchased by her husband and another in partnership, who mortgaged the same, when the land was afterwards sold to a third person who took up the mortgage. *Agnew v. Renwick*, 1, 562

27. Paper here was only release of lien of mortgage, but if an assignment, then there was merger. *Id.*, 3, 562

28. Debt being more than twenty years old will be presumed paid. *Id.*, 4, 562

29. Sale here was not under the mortgage, although proceeds were applied thereto. *Id.*, 5, 562

30. CHATTEL. Chattel mortgage is good without witnesses, but must have one for probate. Proof by one sufficient. *McGowan v. Reid*, 1, 262

31. Chattels may be seized under mortgage by agent appointed by parol. If appointment be in writing, witness not necessary to prove it. *Ibid.*, 3, 263

32. Mortgagor cannot recover damages for seizure of property pointed out by himself to the agent. *Id.*, 4, 263

33. Mortgage may subsist after note is barred. *Id.*, 5, 263

34. Possession of chattel by mortgagor after default is not adverse. *Ibid.*, 6, 263

35. Contract here construed to be a mortgage and not a conditional sale, and mortgagee entitled to recover deficiency. *Talbott v. Sundifer*, 624

36. Agreement in this case was only a bailment. *Ludden v. Dusenbury*, 464

## MULTIFARIOUSNESS.

*See* PLEADINGS, 23.

## NEGLIGENCE.

*See* RAILROADS.

1. Age of boy for contributory negligence depends on law of State where accident occurred. *Bridger v. R. R. Co.*, 7, 457

2. If not so fixed, jury must determine as to contributory negligence from his age, &c.—evidence of his caution, &c., properly excluded. *Id.*, 8, 9, 457

## NEGOTIABLE INSTRUMENTS.

1. Negotiable note is indefensible in hands of transferee by delivery. *Mars v. Mars*, 2, 132

2. Authority to agent to transfer authorizes him to endorse, and purchaser has good title without regard to agent's instructions. *Id.*, 3, 4, 5, 132

## OFFICERS.

See CIRCUIT JUDGE.

## PARTIES.

See PLEADINGS, 24.

## PARTITION.

1. On application, in partition, to settle A's share on his wife, creditors of A may intervene by petition. *Ex parte Crawford*, 159
2. Judge may hear and determine case in partition at chambers if actually in county where land lies—but not while in another county. *Woodward v. Elliott*, 3, 4, 368

## PARTNERSHIP.

1. Nine lot owners erected building in common—held to be partners. *Whitman v. Bowden*, 1, 53
2. A building committee of these nine might openly contract to erect this building. *Id.*, 2, 53
3. But having obtained bid for fictitious bidders and then sublet at a profit, they were liable to their partners. *Id.*, 3, 53
4. Continued payments by other partners after learning of this fraud did not estop them. *Id.*, 4, 53
5. Partnership sufficiently alleged. If deficient in form, it was curable by amendment. *Moses v. Hatfield*, 3, 325

6. One partner may assign mortgage and evidences of debt secured thereby. *Id.*, 4, 325

7. A married woman cannot enter into a contract of partnership—and why. *Gwynn v. Gwynn*, 4, 526

8. Recognition of a partnership and its debts in a deed of assignment by a married woman did not validate either. *Id.*, 9, 526

## PART PERFORMANCE.

See FRAUDS, STATUTE OF, 16.

## PAYMENT.

Naval stores shipped in this case might be applied other than to mortgage debt under its terms. *Whilden & Co. v. Pearce*, 4, 44

## PETITION FOR REHEARING.

1. Granted. *Dial v. Gary*, 6, 171
2. Refused. *Agnew v. Renwick*, 2, 562  
*R. R. Co. v. Gibbes*, 385

## PLEADINGS.

See PRACTICE.

1. Proper way to plead statute of limitations. *Walker v. Laney*, 4, 150
2. Estoppel need not be specially pleaded—certainly not to an answer. *Lites v. Addison*, 5, 227

3. Decree is erroneous if based on ground not raised by pleadings. *Magovern v. Richard*, 2, 272
4. Defendant cannot deny title in plaintiff and also claim specific performance of contract to convey. *Boozar v. Teague*, 5, 348
5. AMENDMENTS. Plaintiff permitted to amend complaint to raise question of constructive trust. *Nesbitt v. Cavender*, 4, 1
6. Amendment may be permitted if it does not change pleading. *McKnight v. Cooper*, 1, 92
7. Where action was to recover improvements, amendment may state additional ground for such a claim. *Ibid.*, 2, 93
8. Action by a purchaser without proper title for recovery of land cannot be converted into action for foreclosure. *Johnson v. Johnson*, 5, 309
9. Partnership sufficiently alleged here. If deficient in form, it was curable by amendment. *Moses v. Hatfield*, 3, 325
10. ANSWER. When it is frivolous. *American Co. v. Hill*, 1, 164
11. Denial does not put in issue the corporate existence or right to sue of plaintiff. *Ibid.*, 2, 164
12. Denial of the notes sued on in this case raised an issue and was not frivolous. *Ibid.*, 3, 164
13. Under general denial, defendant may insist on absence of a demand. *Burckhalter v. Mitchell*, 3, 240
14. General denial raises no issue of failure of consideration, which is an affirmative defence. *Derry v. Holman*, 621
15. Motion to amend answer and plead affirmative defences comes too late at the trial. *Ibid.*, 621
16. COMPLAINT not bad on demurrer for failing to allege plaintiff's right to possession of the land sued for. *R. R. Co. v. Garner*, 50
17. Parol testimony generally inadmissible to show that maker of note was agent, but complaint so alleging is good. *Tarver v. Garlington*, 107
18. Prayer for relief is no part of the complaint. *Butler v. Williams*, 1, 221
19. DEMURRER. No demurrer lies for too many parties. *Lowry v. Jackson*, 1, 318
20. Joint demurrer not good unless good as to all. *Ibid.*, 4, 318
21. On overruling demurrer, judge may impose payment of costs as condition of leave to answer. *Ibid.*, 6, 318
22. Under demurrer to complaint to vacate deed for fraud, question of homestead is not involved. *Hollady v. Hollady*, 622
23. JOINDER OF ACTIONS. (See ante No. 19.) Three notes may be stated as one cause of action, and if imperfect or informal, motion and not demurrer is the

remedy. *Holland v. Kemp*,  
623

24. PARTIES. On application in partition to settle A's share on his wife, creditors of A may intervene by petition. *Ex parte Crawford*, 159

25. Administrator of deceased mortgagor not necessary party to action for foreclosure. *Butler v. Williams*, 1, 221

26. Nor are the heirs at law of a deceased mortgagor who had assigned his estate. *Ibid.*, 2, 221

27. In action to subject real estate descended to payment of debts, administrator should be a party to account for personalty. *Lowry v. Jackson*, 318

28. When husband should be joined in suit against wife. *Ibid.*, 5, 318

29. One creditor in judgment may sue for all creditors to vacate deed for fraud. *State v. Foot*, 1, 340

### POWERS.

1. Legal title of mortgagor passes under the power of sale only when deed is made in his name. *Johnson v. Johnson*, 3, 309

2. Such power cannot be revoked by mortgagor, but is not coupled with interest and terminates at mortgagor's death. *Id.*, 4, 309

3. Under power to L. in this deed to dispose of, L. could have the trustee to mortgage only her in-

terest. *Wallace v. Craig*, 2, 514

4. Power to executors to divide was not personal, and therefore might be exercised by only one. *Smith v. Winn*, 2, 591

5. Married woman, trustee, and others bound by partition made by such executor, they assenting. *Id.*, 3, 591

### PRACTICE.

#### See PLEADINGS.

1. CONTINUANCES rest with the judge. *State v. Briggs*, 1, 80

2. COSTS. Where defendant is permitted to answer on paying certain expenses, they should first be ascertained by reference. *Brown v. Brown*, 153

3. EXCEPTIONS. Point reported by master but not otherwise raised below, not considered. *Nesbitt v. Cavender*, 1, 1

4. On appeal from county commissioners, only errors alleged in exceptions are before Circuit Court. *Green v. Com'rs*, 1, 9

5. General exception not considered. *Scott v. Alexander*, 10, 16

6. Exceptions should specify errors. *Whilden v. Pearce*, 1, 44

7. Exceptions noted only in master's minutes and not considered on Circuit cannot be raised to Circuit decree. *Wagener v. Murs*, 1, 97

8. Matters stated in the exceptions are not facts in the case. *Lites v. Addison*, 1, 226

9. REFERENCES. Judge may refer case in chancery involving fraud to master to take testimony; parties cannot demand a jury. *Pelzer v. Hughes*, 5, 409

10. Order of reference before answer filed and pending appeal is premature. *Hollady v. Hollady*, 622

11. TRIAL. Plaintiff may at any stage call for evidence of defendant's witness examined before a notary. Refusal to accord this right is ground for vacating nonsuit. *Petrie v. R. R. Co.*, 3, 63

12. It must be left to party to determine the order in which he will adduce his testimony. *Ibid.*, 4, 63

13. Where witness gives incompetent testimony, motion to strike out is the proper remedy. *Wardlaw v. Rayford*, 2, 178

14. Where testimony is misstated or omitted in the charge, judge's attention should be called to it, or motion made for new trial. *State v. Davis*, 3, 609

### PRINCIPAL.

See AGENCY. SURETY.

### RAILROAD COMMISSIONERS.

See RAILROADS, 8, 10.

### RAILROADS.

1. Company not liable for death of brakeman while working hand brakes on icy platform, air brakes being out of order, and brakeman knowing it. *Adkins v. R. R. Co.*, 1, 71

2. Failure to blow on brakes immaterial where not a cause of the accident. *Id.*, 2, 71

3. Is railroad company liable to party injured for failing to give notice of the injury? *Id.*, 3, 71

4. Not duty of railroad company to search for missing brakeman any more than was done here. *Id.*, 4, 71

5. It is for jury to say whether conductor should assist passenger to alight. *Simms v. Railway Co.*, 1, 268

6. What degree of care exonerates one from contributory negligence. It does not depend on age, &c. *Id.*, 2, 268

7. Where two railroad companies were chartered under exemption from act of 1841, § 41, but the two were afterwards consolidated by statute without such exemption, the charter of the consolidated company was thereafter subject to amendment, alteration, and repeal. *Railroad Company v. Gibbes*, 1, 385

8. And being so subject to amendment, the legislature might require it to pay its proportion of expenses of a railroad commission. *Id.*, 2, 385



9. Has a corporation the rights guaranteed by the constitution to individuals? *Id.*, 3, 385

10. Assessment on gross income of a railroad company to pay such expenses, is not a tax on property, but a license tax on business. *Id.*, 4, 385

### RECEIVER.

Receiver may be appointed at chambers, but it is a delicate power which may be corrected on appeal. *Pelzer v. Hughes*, 2, 408

### RECORDING.

See MORTGAGES, 2, 3, 17, 25.

A contract of bailment not having been recorded, was void as to subsequent purchasers, &c. *Ludden v. Dusenbury*, 4, 464

### RECOVERY OF REAL PROPERTY.

1. Complaint not bad on demurrer for failing to allege plaintiff's right to possession of the land sued for. *Railroad Company v. Garner*, 50

2. Plaintiff must recover land on strength of own title at time of action brought. *Johnson v. Johnson*, 1, 309

3. Declarations of former owner to show claim of title may be proved in reply. *Boozar v. Teague*, 12, 349

4. And defendants could not reply

thereto, especially as the testimony so offered was afterwards considered by the judge on motion for new trial. *Id.*, 13, 349

### REFERENCES.

See PRACTICE, 9.

### RENT.

See LANDLORD.

### RES JUDICATA.

1. Under formal answer of infant, nothing is *res judicata* except what is decreed. Decree that intestate died in possession does not adjudicate his seizin. *Boozar v. Teague*, 9, 349

2. Widow's share was not stated in complaint, but was throughout proceedings, in which she took part. She was bound by the sale. *Woodward v. Elliott*, 1, 2, 368

3. A creditor held bound by proceedings for sale of land where he knew of proceedings and did nothing, although only a surety for the debt of the intestate, but holding a judgment as indemnity; and the purchaser took a good title. *Cromer v. Boinest*, 5, 6, 436

4. Evidence of former action by son, through this plaintiff as guardian, was *res inter alios*. *Bridger v. R. R. Co.*, 4, 457

### RIGHT OF WAY.

1. Private way not obtainable across

public road by prescription as against owner of soil. *Whaley v. Stevens*, 6, 549

2. Complaint sufficiently alleged a right of way appendant. *Id.*, 1, 549
3. Evidence of long user of road on defendant's land admissible as a link to establish a right of way appendant. *Id.*, 2, 549
4. A right of way appurtenant must have one terminus on land to which attached and be essential to the enjoyment thereof. A right of way in gross attaches only to the individual and dies with him. *Id.*, 3, 4, 549

### RIVERS.

When a river not navigable is a boundary of lands or of a town, the boundary line goes to the centre of the river. *State v. Columbia*, 2, 137

### RULES OF COURT.

1. Rule 63, as to time for complying with order to pay costs, considered. *Brown v. Brown*, 154
2. An order is not a rule of court. This term defined. *Scott v. Alexander*, 3, 15

### SALES.

1. Written contract of sale here was complete, although signed only by seller. *Bulwinkle v. Cramer*, 3, 377
2. Sale under new judgment ob-

tained by surety based upon old judgment paid off by him, might be referred to the old judgment. *Garvin v. Garvin*, 1, 472

### SPECIFIC PERFORMANCE.

1. Evidence here too shadowy for specific performance, and it was within the statute; and the payment of purchase money and possession were not part performance. *Boozar v. Teague*, 6, 348
2. What will entitle party to specific performance of parol contract for conveyance of land. *Martin v. Patterson*, 621

### STATUTES.

See FRAUDS, 16. LIMITATION OF ACTIONS.

1. Amendment to statute takes effect at its date, leaving prior law operative on prior contracts. *Hardin v. Trimmer*, 6, 111
2. Under the act laying off Columbia, the boundaries were such as the act prescribed, and not as the commissioners laid it off. *State v. Columbia*, 1, 3, 137
3. Court cannot limit terms of a statute granting public lands. *Frampton v. Wheat*, 1, 288
4. To avoid grant which is regular on its face, party must show that conditions of statute were not complied with—and were possible to be complied with. *Id.*, 2, 3, 288

5. Act of 1777, 4 Stat., 363, usury law, considered. *Hardin v. Trimmier*, 112
6. Act of 1784, 4 Stat., 592, grant of vacant lands, construed. *Frampton v. Wheat*, 291
7. Act of 1786, 4 Stat., 751, laying out Columbia, construed. *State v. Columbia*, 142
8. Act of 1791, 5 Stat., 168, as to grant of vacant lands, stated. *Frampton v. Wheat*, 291
9. Act of 1791, 5 Stat., 170, leaves legal title in mortgagor. *Johnson v. Johnson*, 315
10. Act of 1795, 5 Stat., 256, general warranty, construed. *Lessly v. Bowie*, 197
11. Act of 1830, 6 Stat., 409, usury law, considered. *Hardin v. Trimmier*, 2, 112
12. Act of 1841, § 41, 11 Stat., 168, reserving right of amending charters, construed. *R. R. Co. v. Gibbes*, 385
13. Act of 1843, 11 Stat., 256, makes void as to subsequent purchasers, &c., mortgage not recorded in time. *Bloom v. Simms*, 90
14. Act of 1866, 13 Stat., 463, repeal of usury law, stated. *Hardin v. Trimmier*, 2, 113
15. Act of 1870, 14 Stat., 325, declaring rights of married women, construed. *Brown v. Thomson*, 500
16. Act of 1874, 15 Stat., 694, requiring bridge at Gordon's Ferry, stated. *Chick v. Newberry*, 420
17. Act of 1874, 15 Stat., 785, as to injury received on highway, considered. *Id.*, 420
18. Act of 1874, 15 Stat., 787, as to bridges over county boundary lines. *Id.*, 420
19. Act of 1876, 16 Stat., 92, does not affect record of mortgages previously executed. *Bloom v. Simms*, 90
20. Act of 1877, 16 Stat., 325, imposes penalty for charging usury, and is not repealed by act of 1882. *Hardin v. Trimmier*, 2, 111
21. Act of 1878, 16 Stat., 789, creating railroad commission, considered. *R. R. Co. v. Gibbes*, 397
22. Act of 1882, 17 Stat., 841, regulating payment of railroad commission, considered. *R. R. Co. v. Gibbes*, 397
23. Act of 1882, 18 Stat., 12, as to railroad commission, considered. *R. R. Co. v. Gibbes*, 401
24. Act of 1882, 18 Stat., 35, imposing penalty for receiving usury, not inconsistent with act of 1877. *Hardin v. Trimmier*, 2, 111
25. Act of 1882, 18 Stat., 35, requiring recording of contracts for hire, applied. *Ludden v. Dunsenbury*, 464
26. Act of 1884, 18 Stat., 737, to regulate appeals in criminal cases, stated. *State v. Prater*, 600

27. Act of 1884, 18 Stat., 810,  
providing for payment of rail-  
road commission, construed. *R.*  
*R. Co. v. Gibbes*, 385

28. Act of 1885, 19 Stat., 343,  
betterment law, considered. *Mc-*  
*Knight v. Cooper*, 94

29. Act of 1885, 19 Stat., 343,  
does not authorize claim for bet-  
terments in foreclosure suit.  
*Lessly v. Bowie*, 197

30. Act of 1885, 19 Stat., 429,  
vacating of lien warrants, con-  
strued. *Monday v. Elmore*,  
129

31. Act of 1885, 19 Stat., 432,  
betterment law, considered.  
*McKnight v. Cooper*, 94

## SUPREME COURT.

*See* COURTS, 1.

## SURETIES.

1. S. made deposits with right  
to check out. Held, no fraud  
on S.'s surety on prior bond  
given to secure overdrafts. *Saw-*  
*yer v. Senn*, 2, 251

2. Surety gave her note and pro-  
ceeds were credited on deposit  
account and then withdrawn and  
cancelled; neither surety nor  
her subsequent mortgagee could  
claim that such credit was pay-  
ment. *Id.*, 3, 251

3. Extension of time to surety does  
not release surety. *Id.*, 5, 251

## TAXATION.

A bridge over a river partly in the

city was subject to taxation, and  
prohibition granted to restrain  
the tax refused. *State v. Co-*  
*lumbia*, 5, 137

## TRIALS.

*See* PRACTICE, 11.

## TRIAL JUSTICES.

1. Trial justice cannot vacate judg-  
ment nor grant new trial after  
transcript filed. *Lawrence v.*  
*Isear*, 1, 244

2. Where defendant is injured by  
trial justice's judgment by de-  
fault, the remedy is appeal. *Id.*,  
2, 244

## TRUSTS AND TRUSTEES.

1. Plaintiff permitted to amend  
complaint to raise question of  
constructive trust. *Nesbitt v.*  
*Cavender*, 4, 1

2. Where A pays money and B  
takes deed by permission, trust  
results to A. If fraudulently  
done, no title vests in B. *Ram-*  
*age v. Ramage*, 39

3. Where party pays money for an-  
other in whom was legal title,  
there is no resulting trust. *Id.*,  
15, 349

4. Creditors may follow money of  
their debtor expended for land  
bought in his wife's name, but  
not the land itself. *Bridgers v.*  
*Howell*, 4, 425

5. In such land there is no result-  
ing trust to husband and no

estate in him out of which he can claim homestead. *Id.*, 5, 525

6. Under deed of assignment, trust results to grantor, and when by a married woman, it results after debts are paid for which she is legally liable. *Gwynn v. Gwynn*, 8, 526

### USURY.

1. A lent B money at usurious interest, and then act of 1882 was passed which enables borrower to recover double his payments, after which B paid in full and sued to recover double amount paid in excess of principal. Held, that he was entitled to recover. *Hardin v. Trimmier*, 1, 110
2. Charging and receiving usury are prohibited by separate acts, which are not inconsistent. *Id.*, 2, 111
3. Imposing penalty for receiving on an existing usurious contract does not impair the obligation of a contract, nor is it retroactive. *Id.*, 3, 7, 111
4. On usurious contract only prin-

cipal is the debt. The interest is void. *Id.*, 4, 7, 111

5. Voluntary payment does not estop debtor from demanding the penalty. *Id.*, 5, 111

### WARRANTY.

*See COVENANTS.*

### WILLS.

1. Intention of testator, to be ascertained from will and environments, govern construction. *Jaudon v. Ducker*, 1, 295
2. Pecuniary legacies of this will were a charge on the realty devised as a residue. *Id.*, 2, 295

### WITNESSES.

*See DEEDS*, 1.

1. Chattel mortgage is good without witnesses, but must have one for probate. Proof by one sufficient. *McGowan v. Reid*, 1, 262
2. Number of witnesses required to a paper should all be produced to prove it. *Id.*, 2, 263





